87-472

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,

Petitioners,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, and The Fidelity Standard Life Insurance Company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Whether an order of a state court, in a construction defects action, enjoining a party, just before trial, from presenting its expert evidence to the jury, as a discovery sanction, is tantamount to dismissal and violates Petitioners' constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection, in the absence of an evidentiary hearing by the trial court and any findings of wilful disobedience, gross indifference, or intended negligence, when such evidence thus precluded had been conceded by all parties as necessary to establish the claims of the Petitioners below, where the trial court considered no less drastic evidentiary sanctions?

2. Whether an order of a state court, requiring a party, just before trial, to post three-quarters-of-a-million-dollars as security for trial by jury is tantamount to dismissal and violates Petitioners' constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection, in the absence of an evidentiary hearing by the trial court and any findings of probable cause or likely outcome, under threat of punishment for contempt?

3. Whether a trial judge's refusal to disqualify himself from presiding at a state trial in which he will be required to sit as a trier of fact, following his having already rendered substantive decisions in the case on those identical facts against a party, violates Petitioners' constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection, denying to them an unbiased trier of fact without the type of pre-judgment which would permit the challenging of a juror for cause?

4. Whether a state appellate court's refusal, on an appeal as a matter of right, to consider Petitioners' claim that the preclusion of their experts violated state and federal law, is tantamount to no appeal at all and violates Petitioners' constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection in the state appellate process?

5. Whether a state appellate court's refusal, on an appeal as a matter of right, to consider Petitioner's claim that a three-quarters-of-a-million-dollars security order violated state and federal law, is tantamount to no appeal at all and violates Petitioners' constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection in the state appellate process?

6. Whether a state appellate court's refusal, on an appeal as a matter of right, to consider Petitioners' claim that the trial judge was disqualified from proceeding as a trier of fact as a matter of state and federal law, is tantamount to no appeal at all and violates Petitioners' constitutional rights under the

Fourteenth Amendment to Due Process and Equal Protection in the state appellate process?

7. Whether a state appellate court's refusal, on an appeal as a matter of right, to consider Petitioners' constitutional claims in these circumstances, on the grounds that they did not proceed to trial without their evidence, unable to post the three-quarters-of-a-million-dollars security, and before a trier of fact with a bent of mind, is tantamount to punishment for Petitioners' refusal to accept such a denial of their constitutional rights under the Fourteenth Amendment to Due Process and Equal Protection, and thus violates such constitutional guarantees?

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JURISDICTIONAL GROUNDS

The Judgment of the Intermediate Court of Appeals of the State of Hawaii which Petitioners seek to review in this Court is dated May 19, 1987; Judgment was also entered on that date.

The Opinion of the Intermediate Court of Appeals below was rendered on April 3, 1987, and was amended, upon timely motion for reconsideraton, by Order Amending Opinion of Court, dated April 22, 1987.

Petitioners sought review in the Hawaii Supreme Court, pursuant to local rules, which Writ Application, duly filed, was denied, on May 8, 1987.

Respondents Willis Sinsabaugh and Waterfront Properties, Inc., also sought reconsideration of the denial of their costs in the Hawaii Intermediate Court of Appeals, which motion for reconsideration was denied on May 5, 1987; these Respondents, however, did not apply for review by the Hawaii Supreme Court, the time for which expired on May 18, 1987.

Thus, on May 19, 1987, the Judgment of the Intermediate Court of Appeals was entered on the rehearing.

Jurisdiction of this Court is based upon the provisions of Section 2101(c), allowing ninety days *after the entry of judgment* within which to make application.

GOVERNING CONSTITUTIONAL PROVISIONS

Fourteenth Amendment to the United States Constitution (1868):

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*[1]

[1]Emphasis supplied.

STATEMENT OF THE CASE

The Richardson Petitioners are residents of Hong Kong who were kidnap victims of Central American terrorists in 1981; once freed from his underground dungeon, after 100 days, Mr. Richardson joined his wife in Hawaii where, on the advice of their physician, they purchased a home in which to recuperate from their ordeal. Later the property was transferred to their family corporation, Petitioner Copthorne, N.V.

Petitioners paid $500,000 down for their waterfront residence and continued to make payments to the seller, Mr. Lane, until winter rains brought extensive flooding and subsequent investigation revealed that the house construction was defective and hidden defects had been concealed from them, with full knowledge, by Mr. Lane and his brokers, Waterfront Properties and Mr. Sinsabaugh.

On March 29, 1982, suit was brought in state court in Hawaii for rescission, for fraud, and for damages; later The Fidelity Standard Life Insurance Company intervened in the action, holding the underlying mortgage from Mr. Lane on the property. On July 23, 1982, Mr. Lane filed for Chapter 11 protection in federal court in Hawaii, and the state suit was stayed until permitted to proceed by the bankruptcy court on September 30, 1982.

The action below was extensively litigated in state court for three years. Over 700 documents were filed in state court; more than 50 oral depositions were taken, some lasting four days, in Hawaii, Hong Kong, Texas, and California; 45 pretrial motions were argued by the parties; more than one-half million dollars was spent by the parties for attorneys' fees and costs, and Petitioners alone spent more than $100,000 for experts in preparation for trial.

Hawaii has given its Chief Justice extensive management responsibilities, including reassigning judges at different court levels; three court days before the trial date assigned for this action below, the trial was assigned to a state district court judge, temporarily appointed to the circuit court from his traffic court duties and related exclusively nonjury work.

On less than 24-hours notice, the trial attorneys for Mr. Lane moved the temporary trial judge, newly appointed and obviously unfamiliar with the complexities of the case, just two court days before trial, for dismissal based on alleged failure to provide sufficient time for them to have deposed Petitioners' experts, and for an order requiring Petitioners to post what was owed on the sale before trial began.

Even Mr. Lane's attorneys, in brief oral argument, acknowledged that the expert testimony involved was "the guts of this case" and asked the trial court only to "put the trial off for a specific amount of time, a week, and let us finish these oral depositions".[2]

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[2]Appendix L, line 4, page 15, lines 22–24, page 14.

In truth, Petitioners had permitted weeks of depositions of their experts during the months before trial and had only objected to more such discovery the week before trial; as a matter of law, the court rules did not even permit any discovery within 30 days of trial anyway.

The temporary trial judge, however, at that time completely unfamiliar with the case and without an evidentiary hearing stunned everyone in the courtroom by ordering that Petitioners could not use their major experts and evidence at trial. He then ordered that Petitioners must deposit with the court $743,750 as security for trial over-the-weekend. The entire record of these bizarre rulings is contained within the official transcripts of both hearings set forth in Appendix L to this Petition. Prior thereto the state court had imposed *no* discovery sanctions of any kind upon Petitioners. Upon being informed by Petitioners' attorneys that Petitioners would be unable to go to trial that following week without their experts and could not post such "security" for trial over-the-weekend, the temporary trial judge informed Petitioners' attorney that that was their problem.

Petitioners made vigorous attempts to seek reconsideration or an interlocutory appeal, but all such efforts were rebuked, and even sought immediate review in the Hawaii Supreme Court by emergency writ, which effort was denied on the grounds that there would be an adequate remedy by way of appeal, in *Richardson v. Sasaki*, Hawaii, No. 10414, January 28, 1985.

On the next court day, immediately prior to the start of trial, Petitioners then moved to disqualify the temporary trial judge assigned, not on the basis that they did not like his rulings, but on the basis that he had decided, without an evidentiary

hearing, issues based upon facts which he would be called upon again at trial to decide based upon the evidence at trial, since the case was a mixed judge/jury action, and that Petitioners had a constitutional right to a trial by a trier of fact without a bent of mind whose knowledge was restricted to the evidence to be presented at trial; Judge Sasaki refused even to consider disqualification.[3]

Prior to the start of trial, on January 21, 1985, Petitioners informed the court that they would be unable to go to trial as they could not prove their case without their expert evidence, that they were unable to post $743,750 as security for trial, and that they would not accept a biased trial judge as satisfying their constitutional rights to a fair trial.

Petitioners at that time were entering their seventies; Mrs. Richardson was so ill that only at the last minute did her Hong Kong physician permit her to leave for the trial; Mr. Richardson had a serious heart condition. Neither they nor their counsel perceived the wisdom or necessity of going through a "fire drill" conducting a trial without their evidence; as a result, the Petitioners returned to Hong Kong obviously disillusioned with American justice, to seek their appellate remedies.

The trial court then immediately granted default judgments on the counterclaim for cancellation of the sale, and dismissed Petitioners' complaint, granting to Mr. Lane and Mr. Sinsabaugh and Waterfront Properties extensive fee and cost awards, without even adherence to state procedural rules, some of which orders were reversed on appeal.

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[3]Appendix M.

In further support of Petitioners' claim of bias, it was subsequently learned that the temporary trial judge had met secretly with those victorious Respondents in his chambers to draw up the judgments, without notice to Petitioners, in violation of universally accepted judicial ethical rules.

And, the only damages awarded against Petitioners, notwithstanding the prior order to post $743,750 as security for trial, even upon an "uncontested" default hearing, was only $1.00 each.[4]

Petitioners appealed as of right pursuant to Section 641-1 of the Hawaii Revised Statutes. Their first appeal was refused by the Intermediate Court of Appeals, to which under state law the appeal was assigned by the Hawaii Supreme Court, because the temporary trial judge had forgotten to dismiss the cross-claims among Respondents below in his written judgments.

Petitioners appealed again, anew, and that appeal was also heard by the Intermediate Court of Appeals, by assignment. In its opinion[5] the Intermediate Court again refused to consider the merits of Petitioners' constitutional arguments and held that since Petitioners did not proceed to trial on January 21, 1985, notwithstanding their reasons, the state appellate court would not consider the events that occurred before then—which of course was "the guts" of Petitioners' appellate case.

Upon a motion for reconsideration, the Intermediate Court did correct part of the trial judgments pertaining to obvious

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[4]Appendix I, paragraph 4.
[5]Appendix

excessive cost awards, but continued to refuse to provide a review on the merits of Petitioners' grounds for appeal, except for minor procedural matters. Review was then denied by the Hawaii Supreme Court, without opinion or consideration of the merits of the appeal, upon which Petitioners now appeal to this Court for justice and for a vindication of their federal constitutional rights.

TREATMENT OF FEDERAL QUESTIONS BELOW

The federal questions sought to be reviewed were raised by Petitioners at *every* level within the state court system.

The original motions of Respondents seeking discovery sanctions and security for trial were presented to the temporary trial judge on less than 24-hours notice, and no opportunity was provided at that time to file written objections.

At the January 17, 1985, hearing, the court had given no prior warning that it would preclude witnesses, and permitted no further argument.

At the January 18, 1985, hearing on security, Petitioners' attorney protested on federal constitutional grounds:[6]

> This is an order to provide security and both state law and federal law of a constitutional foundation decided by the United States Supreme Court in the last decade require findings of fact; . . . My understanding of federal constitutional law is that a state attachment process can not issue unless there is a finding of fact concerning the likelihood of success, and no such findings of fact has been made.

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[6]Transcript of Proceedings, January 18, 1985, page 38, lines 15–18, 5–8.

When the order below requiring a security deposit was presented to the Petitioners' counsel below for signature as to form, he refused and inscribed:[7]

> Decline to sign as the substance and form of this Order are unconstitutional.

On January 21, 1985, Petitioners' counsel below filed written objections to both the preclusion and security rulings, citing their unconstitutional character.[8]

On January 21, 1985, just prior to the start of trial, Petitioners' counsel continued to protest that they were not being provided a fair trial:[9]

> Your Honor, my clients will not waive their trial by jury but have instructed me not to participate in this proceeding because we believe they're being deprived their constitutional right to trial by jury and to a trial judge who is impartial.

When the trial court then proceeded to hold additional hearings to assess costs and attorney's fees, Petitioners' counsel presented the trial court with written objections to the proceedings, stating with specificity eight grounds for

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[7]Order dated January 27, 1985, signed by Judge Sasaki, page 2.

[8]Record, Volume XIII, 255–264, Volume XIII, 266–272.

[9]Transcript of Proceedings, January 21, 1985, page 16, lines 19–23.

constitutional objections, which included the preclusion and security rulings, in each case stating:[10]

> are unconstitutional and represent a denial of federal due process and equal protection guarantees.

On January 22, 1985, Petitioners filed an application in the Hawaii Supreme Court, Case No. 10414, seeking a Writ of Mandamus, for immediate relief, and argued, on constitutional grounds, that they had been denied a "trial by jury" and a "fair trial" contrary to "federal constitutional law."[11] The application was denied on the basis that Petitioners would have a remedy by way of appeal.

Subsequent to the decisions below, Petitioners filed two separate appeals, assigned to and heard by the Intermediate Court of Appeals; two opening briefs were filed and two sets of reply briefs, by these Petitioners; in every brief filed Petitioners recited their contention that the actions complained of "denied to Plaintiffs fundamental Hawaii and United States Constitutional guarantees to trial by jury, due process of law, and equal protection of the law". This argument was presented throughout the appellate record below, in argument after argument, citing most of the cases referred to in this Petition, and the same reasoning on constitutional grounds now presented here.

Petitioners in their motion for reconsideration recently before the Intermediate Court, and their attempt thereafter

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[10]Statement of Objection On Jurisdictional and Constitutional Grounds, etc., filed February 19, 1985; Record, Volume XVI 1–10, at 2, 3, 4, 6, 7, 8, and 9.

[11]Petition, page 4.

to secure review in the Hawaii Supreme Court, continued to make their federal constitutional arguments known to these state appellate courts; for instance, their application for a writ of certiorari presented to the Hawaii Supreme Court on May 4, 1987, specified three grounds for review, which are briefly summarized below as follows:

1. that the preclusion and the security rulings of the trial court violated "the due process and jury trial guarantees of the Hawaii and United States Constitutions"
2. that the various procedural errors and ethical violations by the trial judge violated "the due process and jury trial guarantees of the Hawaii and United States Constitutions"
3. that the failure of the Intermediate Court of Appeals to grant an appeal on the merits by considering Petitioners' claims is "contrary to the due process and equal protection guarantees of the Hawaii and United States Constitutions"

Neither the trial court, the Intermediate Court of Appeals, or the Hawaii Supreme Court, in oral argument or in written opinions or orders ever *once* addressed any of those federal constitutional issues which were presented below, nor did they ever *once* even address their significance as a matter of Hawaii law. Neither the merits of the case *or* of the constitutional questions were ever examined. Their rejection, on the other hand, is implicit within all of the state court decisions rendered against these Petitioners, notwithstanding their federal constitutional objections.

LEGAL ARGUMENT

Petitioners request that a Writ of Certiorari be granted to review the decision of the Hawaii Intermediate Court of Appeals for the following reasons:

POINT I

Certiorari should be granted because the state appellate court has decided federal questions in a manner which directly conflicts with the applicable decisions of this Court.

This Court has consistently held that the Fourteenth Amendment prohibits state courts from punishing litigants by imposing discovery sanctions which impair their ability to prove their case in court unless there has been a long history of such pretrial abuses documented in a particular case, an evidentiary hearing has been held, and a prior opportunity given for compliance beforehand. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1908). This requirement of due process of law is firmly embedded within this Court's constitutional doctrine, both with respect to state courts and the federal judicial system. See *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958); *Hovey v. Elliott*, 167 U.S. 409 (1897).

Similarly, *every* federal Court of Appeals which has considered such issues has ruled consistently with this Court's constitutional mandate that all litigants be permitted to have their day in court without unnecessary pretrial contempt citations. *Scarborough v. Eubanks*, 747 F.2d 871 (3rd Cir. 1984); *Potlach Corp. v. U.S.*, 679 F.2d 153 (9th Cir. 1982); *Marshall v. Segona*, 621 F.2d 763 (5th Cir. 1980); *Wilson v. Volkswagen of America*, 561 F.2d 494 (4th Cir. 1977); *Flaks v. Koegel*, 504 F.2d 702 (2d Cir. 1974); *Richmond v. General Motors*, 437 F.2d 196 (1st Cir. 1971); and the state decisions are also in accord, see *Kemp v. Qualls*, 473 A.2d 1369 (Pa. 1984); *Grimes v. Haslett*, 641 P.2d 813 (Alaska 1982); *Gerhart v. Honeoye Storage Corp., 88 A.D.2d 757 (4th Dept. N.Y. 1982); Fox v. How*, 309 N.W.2d 520 (Iowa 1981); *Dugan v. Jones*, 615 P.2d 1239 (Utah 1980).

Indeed, such preclusion amounts to a *dismissal* by the trial court:[12]

> [J]ust as establishment of dispositive facts has the same effect as judgment by default or dismissal, when the effect of a preclusion order is to prevent introduction of evidence necessary to establish the claim of the delinquent party, so does the sanction under Rule 37(b)(2)(B).
>
> Accordingly, it has been held that before a preclusion order will be made relating to a necessary element of the case, there must be some showing of wilful disobedience or gross indifference to the rights of the adverse party, deliberate callousness or intended negligence.

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[12]Moore's *Federal Practice*, Rule 37, Vol. 4A, pp. 37–70 and 37–71.

Identically, the lower court's $743,750 security order on the eve of trial is equally offensive to due process holdings of this Court, rendered without an evidentiary hearing, without findings of fact, and without provision for prejudgment procedures of any sort. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); see *Randone v. Superior Court, 5 Cal.3d 536 (1971); Brunswick Corp. v. Galaxy Cocktail Lounge*, 54 Haw. 656 (1973).

This Court, in *Fuentes*, identified the common evil in both such security and preclusion orders, that procedural due process demands a fair opportunity to be heard before such drastic measures may be taken and findings of fact that will support such rulings.

The issue of disqualification of a biased trial judge is similarly determined by due process considerations, as this Court has recently held. *Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580 (1986); such bias need not be extraneous to the action itself, for, if "before a case is over, a judge's bias appears to have become overpowering, we think it disqualifies him", *Whitaker v. McLean*, 118 F.2d 596 (D.C. 1941).

The fundamental right to be tried by an impartial judge is at the bedrock of due process of law, yet Petitioners' challenge to their temporary trial judge was completely ignored; see *Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir. 1974) for the thoughtful analysis of Circuit Judge MacKinnon in dissent. The issues of bias raised here present matters of great importance that should be settled by this Court.

The state appellate court confronted all three of these constitutionally sensitive problems in its opinion below[13] with the vigilance of ostriches.

First, the Hawaii Intermediate Court refused to consider the issues of preclusion, security, and disqualification at all, stating that it would not review events prior to the lower court's dismissal on January 21, 1985, which occurred because the trial court's rulings made it impossible for Petitioners to proceed with trial. Such reasoning only argues in a circle, for the actual questions on appeal pertain to the effect of such prior matters on Petitioners' constitutional rights.

For example, as Petitioners' claim, the *actual* dismissal occurred on January 17th and 18th when the trial court took a hatchet to Petitioners' case, the judicial equivalent to cutting out someone's tongue and then criticizing them for not being further able to speak.

Second, the Hawaii Intermediate Court totally ignored the record below. What makes this case a perfect one for review is that the trial court made *no record* to support its actions below. The temporary trial judge had had the file for only one day and had had no prior experience with the action, making it impossible to conclude that he was experienced with any long-standing discovery abuse. The voluminous record in the action contains *not one* prior discovery sanction imposed, despite numerous self-serving pretrial motions in the case. There was *not even a single minute of evidentiary hearings allowed.* And *no findings of fact* were even attempted with

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[13]Appendix A.

respect to the preclusion injunction, the security injunction, or the disqualification rejection. Although Respondents would like to supplement the record with adversarial contentions, the plain fact is that everything that was done to these Petitioners below resembled the fact gathering of the Star Chamber.

Had the Intermediate Court looked at what was in the record, it would have witnessed an overwhelming amount of contrary evidence. The claim of Mr. Lane that he had not been allowed to take the oral depositions of Petitioners' experts could have been *compared to* the nearly one-foot-high stack of deposition transcripts taken of Petitioners' experts only weeks before the trial date. Mr. Lane's attorney's claim that he needed more time with expert Lipman could have been *compared to* his recorded statement at the end of Mr. Lipman's last deposition: "I have no further questions".[14]

There is a greater vice in the Intermediate Court's opinion than mere oversight. Petitioners were entitled to an appeal as a matter of right. Having had no consideration of their appeal on the merits in the state appellate process, Petitioners have thus also been denied equal protection of the law as well as due process guarantees, as a meaningful opportunity to be heard was not even accorded here, although provided to others in the state in the appellate process. See *Pennzoil Co. v. Texaco*, 107 S. Ct. 1519 (1987) (concurring opinion of Justice Brennan).

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[14]By Attorney Gibson, found in Transcript of Lipman, December 19 and 20, 1984, p. 167, in record below.

POINT II

Certiorari should be granted because the state appellate court has interpreted and adopted federal precedents in a manner which erroneously violates federal constitutional guarantees to due process of law.

The Hawaii Intermediate Court justified its refusal to inquire into the merits of Petitioners' appeal by "adopting" what it considered to be the reasoning of a Third Circuit Court of Appeals' decision in 1974, *Marshall v. Sielaff*, 492 F.2d 917. In that case the District Court dismissed plaintiff inmate's civil rights suit after he refused to proceed with his case when his request for writs of habeas corpus ad testificandum for three of his fellow prisoners was denied.

Whatever the constitutional validity of the *Marshall* holding might be, that decision is *wholly inapplicable* to our facts, and to apply it as precedent in Petitioners' case is offensive to the Fourteenth Amendment for a variety of *distinguishing* reasons.

First, in *Marshall* that court had no jurisdiction over the witnesses demanded; here, the experts wanted to testify.

Second, in *Marshall* that court found no clear need for the witnesses' testimony; in our case it was conceded that our experts were "the guts" of Petitioners' case, to cite again the colorful language of Mr. Lane's counsel.

Third, in *Marshall* that court anticipated a short trial, whereas in our suit a trial lasting four to six weeks had been planned for by all sides.

Fourth, in *Marshall* that court announced its findings and conclusions for its preclusion order; here, no such findings and conclusions are presented in the order.[15]

Fifth, in *Marshall* the reviewing court carefully considered what had occurred at the preclusion hearing in deciding the appeal, whereas the Intermediate Court here refused to examine any of the surrounding circumstances.

Sixth, in *Marshall* the trial court had no other choice, no lesser sanctions, as it believed it had no jurisdiction to secure the requested witnesses; in our case the court had many lesser sanctions such as delaying the trial for three days to allow more expert depositions, or requiring that they be held over the weekend before trial, but did not even consider lesser sanctions.

Marshall, in short, was not a preclusion case at all; no discovery sanction punishing the plaintiff was there imposed; the trial court merely made a jurisdictional ruling that could not be appealed until the action was concluded; and that is the key distinction that escaped the Hawaii Intermediate Court, for although embracing *Marshall* in result, what apparently really motivated the Hawaii appellate court was a fear of "piece-meal" appeals—a consideration which hardly outweighs the preservation of constitutional rights to a fair and impartial trial.

Petitioners' situation would be no more of a piece-meal appeal than would result with the entry of any dismissal or summary judgment, where such decision was subsequently reversed—thus resulting in a trial and a later appeal once

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[15]Appendix F.

again. If indeed the effect of the preclusion order constitutionally was a dismissal, as the Petitioners' contend, like any dismissal it would be appealable as a matter of right; the policy against piece-meal appeals has nothing to do with the merits of Petitioners' appeal. If Petitioners' view of the Fourteenth Amendment is correct, it was a dismissal; if not, Petitioners have had no other choice than to accept the result for without their expert evidence their construction defects case was lost anyway. How many civil actions, one might ask, could be deprived of "the guts" of the case and prevail at trial?

Moreover, logic suggests that there should also be a policy against piece-meal trials, if the underlying reasoning is to conserve litigant and court time; piece-meal trials would consume even more system resources, after all. What the Petitioners did was in the interest of saving time; to proceed to a hopeless trial without supporting evidence would serve no purpose, when the issue that would ultimately have to be decided was the constitutional validity of the discovery sanction that crippled the case. If Petitioners lose in this Court, a needless trial was avoided; if Petitioners win their appeal, a needless trial was also avoided. To conclude that Petitioners' failure to proceed to trial is contrary to any policy against piece-meal appeals is to argue against both logic and policy.

The doctrine against piece-meal appeals has itself lost favor, not surprisingly, with American courts, which have repeatedly refused to follow its blind lead when questions of fairness must be weighed in the balance.

Thus, as early as 1848 this Court in *Forgay v. Conrad*, 6 How. 201, permitted "piece-meal" appeals in situations to avoid

irreparable injury. More recently, the Court of Appeals for the Ninth Circuit, in *Anderson v. Allstate Insurance Co.*, 630 F.2d 677 (1980), found the piece-meal appeal argument unpersuasive, in granting appellate review in other situations:[16]

> Mindful of the Supreme Court's command that practical, not technical, considerations are to govern the application of principles of finality, *Gillespie v. United States Steel Corp., 379 U.S. 148. . .(1964); Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541. . .(1949), we decline appellee's invitation to exalt form over substance by dismissing this appeal.

Virtually every other federal Court of Appeals quickly adopted the *Anderson* view; e.g., *Sandidge v. Salem Offshore Drilling Co.*, 764 F.2d 252 (5th Cir. 1985); *Gillis v. U.S. Department Of Health And Human Services*, 759 F.2d 565 (6th Cir. 1985); *Martin v. Campbell*, 692 F.2d 112 (11th Cir. 1982).

It is not surprising therefore that the 1974 *Marshall* decision, which the Hawaii Intermediate Court "adopted" as dispositive of our case, has been abandoned even in its own jurisdiction, see *Reif v. A. H. Robbins*, 90 F.R.D. 526 (E.D. Pa. 1981), and is now cited *only* in *support* of the stated judicial policy against dismissal:[17]

> The Court of Appeals for the Third Circuit has made it clear that dismissal for failure to prosecute is a "harsh remedy and should be

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[16]Quotation from *Jetco Electronic Industries v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir. 1973), cited approvingly in *Anderson*.

[17]*Reif*, supra.

> resorted to only in extreme cases," because the law favors disposition of cases on their merits. *Marshall v. Sielaff*, 492 F.2d 917, 918 (3d Cir. 1974).

The opinion of the Hawaii Intermediate Court of Appeals below would seem to be an anomaly even in Hawaii, for the Hawaii Supreme Court as early as 1978, in *Bagalay v. Lahaina Restoration Foundation*, 60 Haw. 125, held that the dismissal sanction for failure to prosecute should be restricted to "extreme circumstances" where there is a "clear record of delay or contumacious conduct" and where "lesser sanctions would not serve the interest of justice", and that policy was affirmed recently in *Lim v. Harvis Construction*, 65 Haw. 71, 73 (1982).

None of those conditions are present here. No such findings of fact were even attempted by the trial court below. *None.*

POINT III

Certiorari should be granted because our civil justice system is urgently in need of the constitutional guidance of this Court in the management of the growing tensions between court administration and the needs of substantive justice.

For decades this Court under the able leadership of its past Chief Justice has sponsored a long overdue series of impressive court reforms, nationwide, which have speeded up case flow and materially reduced undesirable court congestion.

Regrettably, no revolution can avoid excesses. What happened below may ultimately be but one important manifestation of a growing and general problem. We have been unintentionally transforming our court system into an administrative agency with a mind set that gives priority to administrative convenience even over constitutional concerns.

The temporary inferior court judge who axed Petitioners' case below himself was a product of our new free assignment system, under the total management discretion in Hawaii of one appointed Chief Justice; he certainly understood the new philosophy to speed up cases and reduce backlog, for he would not even delay the trial for a few more days but, with all the self-righteousness of one responsible for establishing train schedules, saw nothing wrong in simply telling Petitioners not to bring their evidence to trial.

Is this the new type of judicial temperament to be permitted under the banner of court reform? This is a federal question that must ultimately be settled by this Court, and this case should be a new starting point.

Were this a criminal case, there could be no doubt that this Court in these circumstances would grant review and reverse. See *Rock v. Arkansas*, No. 86-130, Slip Opinion, June 22, 1987, recently decided by this Court, striking down evidentiary rules that are arbitrary and disproportionate to the purposes they are designed to serve.

Our *civil* justice system is in serious need of similar attention, for often the results in civil cases are equally or even more onerous and depriving.

Petitioners below had paid to Mr. Lane over $600,000 toward the purchase price, and had paid amounts in excess of that for court costs, attorneys' fees, expert expenses, and their own personal litigation costs—all of which was in effect confiscated by the single abrupt decision of one temporary judge, deciding without even an evidentiary hearing and without even having attempted to construct a supporting record with customary findings of fact and conclusions of law.

There are many in our society who might rather spend a few days in jail, or perhaps more, rather than lose over one million dollars in that manner. Neither this Court nor the Fourteenth Amendment should be so blind as to fashion constitutional doctrine based upon unrealistic distinctions plucked from the heaven of legal concepts that insult human experience.

CONCLUSION

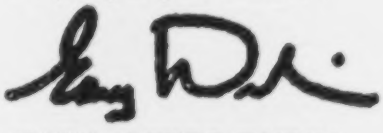
Petitioners have had neither a trial on the merits *nor* an appeal on the merits below, an impressive victory thus far for the sporting theory of justice. This is Petitioners' last chance to secure Justice in their case.

Beyond whatever momentary pomp and circumstance may accompany our celebration of the 200th anniversary of our Constitution, history will surely judge the quality of American Justice, not by the number of drummers in our parades, but by the ultimate treatment of individual cases such as this, where the injustice presented goes back well before 1787, to the historic meadows at Runnymede.

For the reasons given in this Petition, Petitioners pray that the Writ be granted and that the erroneous decision of the Intermediate Court of Appeals of the State of Hawaii affirming the trial court below be summarily reversed *or* that Petitioners be heard on the merits of the case.

Honolulu, Hawaii
August 17, 1987

Respectfully submitted,



GARY VICTOR DUBIN
Counsel for Petitioners

Supreme Court, U.S.
FILED
AUG 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-472

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,

Petitioners,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, and The Fidelity Standard Life Insurance Company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N. V., a Netherland Antilles corporation, Plaintiffs-Appellants, vs. HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40, Defendants-Appellees, and THE FIDELITY STANDARD LIFE INSURANCE COMPANY, INTERVERNOR-DEFENDANT/APPELLEE.

NO. 11353

APPEAL FROM FIRST CIRCUIT COURT

HONORABLE EDWIN Y. SASAKI, JUDGE
HONORABLE PHILIP T. CHUN, JUDGE

(CIVIL NO. 70332)

APRIL 3, 1987

BURNS, C.J., HEEN AND TANAKA, JJ.

DISMISSAL AND NONSUIT—involuntary—want of prosecution.

Dismissals with prejudice are not favored, and appellate courts will uphold such a sanction by the trial court only when there is a clear record of delay or contumacious conduct, and where lesser sanctions would not serve the best interests of justice.

SAME—same—same.

No precise rule can be laid down as to what circumstances justify a dismissal for failure to prosecute, but the procedural history of each case must be examined in order to make that determination. The power of the court to prevent undue delays and to achieve the orderly disposition of cases must be weighed

against the policy of law which favors disposition of litigation on its merits.

SAME—same—same—Rule 41(b), Hawaii Rules of Civil Procedure (HRCP) (1980).

Where on the day of trial plaintiffs did not appear, but the defendants appeared with counsel and the jury panel was present, plaintiffs' counsel informed the trial judge that plaintiffs had instructed him "not to participate in this proceeding" because they were being "deprived of their consitutional right to trial by jury and to a judge who is impartial," and plaintiffs' counsel then left the courtroom, plaintiffs effectively abandoned their cause of action and the trial court correctly dismissed plaintiffs' complaint with prejudice under Rule 41(b), HRCP.

APPEAL AND ERROR—review—interlocutory, collateral, and supplementary proceedings and questions—on appeal from final judgment—interlocutory proceeding brought up in general.

Where an appellate court affirms the trial court's dismissal of a complaint with prejudice for want of prosecution, it will not review alleged errors by the trial court occurring prior to the order or dismissal which were relied upon by appellants as their reason for refusing to proceed with their cause of action.

JUDGMENT—by default—requisites and validity—absence at trial or other proceeding—Rule 55(b) (2), HRCP.

Where on the day of trial the trial court dismissed the plaintiffs' complaint for lack of prosecution, it did not err in entering a default against plaintiffs' on defendants' counterclaims, allowing proof of defendants' damages, and entering default judgments in favor of defendants.

JUDGMENT—by default—opening or setting aside default—discretion of court—Rule 60(b), HRCP.

The function of an appellate court in an appeal from the trial court's refusal to set aside a default judgment is to determine whether the trial court failed to set aside a void judgment or abused its discretion.

OPINION OF THE COURT BY HEEN, J.

Plaintiffs-Appellants Leon D. Richardson and his wife, Margie J. Richardson (hereinafter the Richardsons), and Copthorne N.V. (Copthorne), a Netherland Antilles corporation (hereinafter where appropriate the Richardsons and Copthorne will be referred to collective as Plaintiffs), appeal from the order dismissing their complaint against Defendants-Appellees Howard T. Lane (Lane), Willis Sinsabaugh (Sinsabaugh), and Waterfront Properties, Inc. (Waterfront), a Hawaii corporation (hereinafter where appropriate Lane, Sinsabaugh and Waterfront will be referred to collectively as Defendants), and from the default judgments entered against them on the counterclaims of Lane and Sinsabaugh. We affirm.

This case began as a dispute between the parties over structural deficiencies in a residence purchased by the Richardsons from Lane[1] under an agreement of sale (agreement) which was later assigned to Copthorne. After the complaint, counterclaims against Plaintiffs by Lane for default on the agreement by Lane and Sinsabaugh for defamation, and cross-claims between Lane and Sinsabaugh and Waterfront were filed, trial was scheduled for January 21, 1985. Meanwhile, the matter had deteriorated into a battle over discovery proceedings.

On January 16, 1985, as as result of the most current discovery proceedings dispute between Plaintiffs and Defendants, Lane filed a motion seeking, *inter alia*, (1) dismissal of the complaint; (2) default judgment against Plaintiffs on Lane's counterclaim; and (3) preclusion of the testimony of three of Plaintiffs' expert witnesses. The motion was heard on January 17, 1985, and on that day the trial court orally ordered that Plaintiffs' three experts would be precluded from testifying. Also on January 17, 1985, Lane filed another motion to dismiss alleging that Plaintiffs had failed to comply with a January 14, 1985 order that they deposit in court a sum equal to all payments that had not been made by them under the agreement. This motion was heard on January 18, 1985, and on the same day the trial court orally ordered Plaintiffs to deposit with the court $743,750 cash or other security by 9:30 a.m.,

[1]Waterfront Properties, Inc., was the real estate sales firm that handled the sale, and Willis Sinsabaugh was its agent-employee.

January 21, 1985, the day of trial. Written orders denying the dismissals and the default judgment but granting the motion to preclude Plaintiffs' three experts from testifying and requiring Plaintiffs to deposit $743,750 with the court were entered on January 28, 1985.

On the morning of trial, the jury panel was present and Defendants appeared with their attorneys. Plaintiffs' attorney was present, but Plaintiffs were not. Plaintiffs' counsel filed an "Affidavit of Leon D. Richardson Disqualifying the Honorable Edwin Y. Sasaki" (Judge Sasaki), who had presided over Lane's dismissal motions and who was to be the trial judge. Judge Sasaki refused to disqualify himself. Plaintiffs' counsel then told Judge Sasaki that Plaintiffs were unable to proceed to trial because of the sanctions imposed by Judge Sasaki and Judge Sasaki's refusal to disqualify himself. Judge Sasaki ordered the trial to proceed and directed the clerk to call the roll of the jurors. Plaintiffs' counsel then requested a bench conference at which he stated that Plaintiffs had instructed him "not to participate in this proceeding" because they were "being deprived of their constitutional right to trial by jury and to a trial judge who is impartial[.]" At the end of the bench conference, Plaintiffs' counsel left the courtroom. The trial court thereupon orally dismissed the complaint on its merits, dismissed the cross-claims between Lane and Sinsabaugh and Waterfront, entered a default against Plaintiffs on Lane's and Sinsabaugh's counterclaims, and allowed Defendants to present proof of damages. On January 24, 1985, the court entered findings of fact and conclusions of law, a judgment in favor of Lane and Sinsabaugh, and a separate judgment in favor of Sinsabaugh and Waterfront.[2]

The judgments (1) dismissed the complaint against all Defendants with prejudice; (2) cancelled the agreement of sale and terminated all of Plaintiffs' right, title and interest in the property; (3) authorized Lane to retain all sums paid under the agreement of sale; (4) awarded Lane and Sinsabaugh $1.00 on their counterclaims for defamation; (5) ordered issuance of a writ of

[2]The Fidelity Standard Life Insurance Company, as the first mortgagee of the premises in dispute, was allowed to intervene on July 23, 1984. On January 17, 1985, an order was entered granting the intervenor's motion to declare its mortgage as having first priority and granting a separate trial of its cross-claims against Howard T. Lane.

possession to Lane; and (6) granted Defendants leave to move for attorney's fees.

On February 4, 1985, Plaintiffs filed a motion seeking (1) relief from the order dismissing the complaint and from the judgment, (2) a new trial, and (3) a stay of the judgment. After a hearing, which was attended by Plaintiffs' counsel, the motion was denied on February 26, 1985. Meanwhile, on February 19, 1985, Plaintiffs filed a motion to vacate the default judgment, the order of dismissal, and the order precluding Plaintiffs' expert witnesses' testimony, which was denied on March 19, 1985.

During the period when Plaintiffs were attacking the dismissals and judgment, Defendants moved for costs and attorney's fees and gave notice of their motions to Plaintiffs' counsel. Although neither Plaintiffs nor their counsel appeared at the hearings on the motions, they did file written objections on "jurisdictional and constitutional grounds." On March 6, and 19, 1985, respectively, Lane's motion and Sinsabaugh's and Waterfront's motion for award of attorney's fees were granted.

Plaintiffs filed notices of appeal on February 25, 1985, and on April 18, 1985, which were both dismissed on jurisdictional grounds on December 31, 1985. On May 6, 1986, Plaintiffs filed another notice of appeal.

The following three questions are determinative of this appeal:

(1) Did the trial court err in dismissing Plaintiffs' complaint?

(2) Did the trial court err in entering default judgments in favor of Defendants on their counterclaims?

(3) Did the trial court err in denying Plaintiffs' motion to set aside the order dismissing its complaint and the default judgments?

We find no error. Additionally, for reasons discussed below we will not consider any alleged errors that occurred prior to dismissal of the complaint. Other matters raised by Plaintiffs on appeal are utterly without merit and will not be discussed.

I.

When Plaintiffs' counsel informed the trial court that Plaintiffs had instructed him not to participate further in the proceedings and left the courtroom, Plaintiffs effectively abandoned their cause of action and the trial court correctly dismissed the complaint under

Rule 41(b), Hawaii Rules of Civil Procedure (HRCP) (1980),[3] for lack of prosecution.

Dismissals with prejudice are not favored, *see Lim v. Harvis Construction, Inc.*, 65 Haw. 71, 647 P.2d 290 (1982), and appellate courts will uphold such a sanction by the trial court only "when there is a 'clear record of delay or contumacious conduct . . . and where lesser sanctions would not serve the best interests of justice.'" *Bagalay v. Lahaina Restoration*, 60 Haw. 125, 132, 588 P.2d 416, 422 (1978) (quoting *Boazman v. Economics Laboratory, Inc.*, 537 F.2d 210, 212 (5th Cir. 1976)), 9 Wright & Miller, Federal Practice and Procedure: *Civil* § 2369, at 195 (1971). A party's refusal to proceed with trial is cause for dismissal of his complaint. 9 Wright & Miller, *supra*, § 2370, at 209–210; *Michelson v. Moore-McCormack Lines, Inc.*, 429 F.2d 394 (2nd Cir. 1970); *Thompson v. Fleming*, 402 F.2d 266 (5th Cir. 1968); *Hooper v. Chrysler Motors Corp.*, 325 F.2d 321 (5th Cir. 1963); *cert. denied*, 377 U.S. 967, 84 S.Ct. 1647, 12 L.Ed.2d 736 (1964).

A case factually similar to the case at bar is *Marshall v. Sielaff*, 492 F.2d 917 (3d Cir. 1974). There, the plaintiff, on the day of trial and against the advice of his lawyer, refused to proceed to trial on his civil rights complaint because the trial judge had denied his petition for writs of *habeas corpus ad testificandum* for the

[3]Rule 41(b), Hawaii Rules of Civil Procedure (HRCP) (1980), provides:

Rule 41. DISMISSAL OF ACTIONS.

* * *

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

appearance of three of his fellow prison inmates as plaintiffs' witnesses, claiming those witnesses were essential to his case. The trial court granted the defendant's motion for dismissal for lack of prosecution and the appellate court affirmed. Observing that

> [n]o precise rule can be laid down as to what circumstances justify a dismissal for failure to prosecute, but the procedural history of each case must be examined in order to make that determination. The power of the court to prevent undue delays and to achieve the orderly disposition of cases must be weighed against the policy of law which favors disposition of litigation on its merits[,]

id., at 918, the court held:

> From a careful consideration of history of this litigation and from all the surrounding circumstances, we hold that the district court's dismissal of plaintiff's case for lack of prosecution was not an abuse of discretion. Indeed, appellant left the district judge no choice. The appellant refused to proceed with the trial because of the court's adverse decision on his motion for issuance of a writ *ad testificandum* for the three inmates at Graterford, despite the advice of his counsel that the "proper procedure" was to proceed. Both the appellant and Rayford Smith were present, having been transferred by the prison authorities to the courthouse. The issues in the case may well have been resolved without the other inmate witnesses. If appellant had proceeded, he might have been successful. If appellant had proceeded and lost, the appellate court would have a complete record upon which to make its determination.
>
> For these reasons we affirm the dismissal for lack of prosecution and do not reach the substantive issue involving the denial of the write of habeas corpus *ad testificandum*. To adjudicate the issue of the writ under the circumstances of this case would undermine the "basic and persisting policy against piecemeal appeals." *Cf. Borden Co. v. Sylk*, 3 Cir. 1969, 410 F.2d 843; *Kelly v. Greer*, 3 Cir. 1961, 295 F.2d 18; *Panichella v. Pennsylvania Railroad Co.*, 3 Cir. 1958, 252 F.2d 452, 454. If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure

> to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C.A. § 1291. To review the district court's refusal to grant the writ under the facts of this case is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases.

Id. at 919.

We adopt the reasoning of *Marshall* and apply it to the instant case. By refusing to proceed with the trial, Plaintiffs left the trial court no choice but to dismiss their complaint. Plaintiffs' argument that the preclusion order was destructive of their case carries no weight against the record here. There is no way we can evaluate the effect of the order because Plaintiffs' refusal to proceed has left us without a record of the remainder of their proof. Finally, as stated above, we will not discuss alleged errors that occurred prior to the dismissal of the complaint, as to do so would be contrary to this jurisdiction's policy against piecemeal appeals.[4] *Doe V v. Roe V*, 5 Haw. App. 610, 704 P.2d 940 (1985).

We point out that we do not deem it fatal to the trial court's decision that it acted *sua sponte* rather than on a motion to dismiss from Defendants. We are aware that in *Lim v. Harvis Construction, Inc.*, 65 Haw. 71, 647 P.2d 290 (1982), the supreme court held that dismissal under Rule 41(b) requires a motion, notice and hearing. However, the circumstances in that case were vastly different from those in the case at bar. In *Lim* the court's order of dismissal was based only on a letter from defense counsel. Here, Plaintiffs' intentions were announced by their counsel in court before he exited. A formal motion, notice, and hearing would have been superfluous. Moreover, a fair inference from the record is that Plaintiffs and their counsel would not have appeared at such a hearing.

[4]The transcript of the January 21, 1985 hearing indicates that Plaintiffs' counsel orally requested permission to take an interlocutory appeal, which was denied.

II.

Plaintiffs contend the default judgment is in error because they were not given any notice of the hearing on the application for default judgment on Defendants' counterclaims, as required by Rule 55(b) (2), HRCP (1980).[5] The argument is specious. The same actions by Plaintiffs that justified the dismissal justified the trial court in declaring the default and rendering the default judgment. Defendants were present with their witnesses, and in light of all the circumstances, there was no conceivable reason for the trial court to refuse to proceed with Defendants' proof. Moreover, we see no reason why Plaintiffs might have thought that their exit from the courtroom would deprive the trial court of its jurisdiction and authority to act.

> While the failure to give the required notice is generally regarded as a serious procedural irregularity that may afford the basis for reversal on appeal, or for relief under an appropriate clause of Rule 60(b) and in conjunction with other irregularities may render the judgment void, the error should not usually be treated as so serious as to render the judgment void. It should be considered in light of surrounding circumstances and will, at times, be harmless.

7 Moore's Federal Practice ¶ 60.25[2], at 60-238 (2d ed. 1985) (footnotes omitted). *Cf. Blois* v. *Friday*, 612 F.2d 938 (5th Cir. 1980).

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[5]Rule 55(b) (2), HRCP (1980), provides:

> Rule 55. DEFAULT.
>
> (b) Judgment. Judgment by default may be entered as follows:
>
> * * *
>
> (2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian, or other such representative who has appeared therein, and upon whom service may be made under Rule 17. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute.

Here, the surrounding circumstances render the procedural error harmless.[6]

III.

Plaintiffs argue that the trial court abused its discretion in refusing to set aside the dismissal and the default judgments, citing Rule 60(b), HRCP (1980).

The function of an appellate court in an appeal from the trial court's refusal to set aside a default judgment "is to determine whether the district court failed to set aside a void judgment or abused its discretion." *Textile Banking Co., Inc. v. Rantschler*, 657 F.2d 844, 850 (7th Cir. 1981). There is nothing in the record to render the judgment void, and the circumstances clearly indicate no abuse of discretion by the trial court in denying Plaintiffs' motion to vacate the dismissal and the default judgments.

Although the findings of fact and conclusions of law and the judgments were not submitted to Plaintiffs' counsel for approval as to form as required by Rule 21, Rules of the Circuit Court (RCC) (1971), those documents do not vary from the record and Plaintiffs were not prejudiced. *Cf. Baldwin v. Hawaiian Agronomics Co.*, 53 Haw. 447, 496 P.2d 9 (1972). The record does show that notices of the entry of those documents were sent to Plaintiffs on January 24, 1985. In our view, the failure to comply with Rule 21, RCC, does not, in the circumstances of this case, render the order of dismissal or the judgments void, and the trial court did not abuse its discretion in denying Plaintiffs' Rule 60(b) motions. *Isemoto Contracting Co., Ltd. v. Andrade*, 1 Haw. App. 202, 616 P.2d 1022 (1980).

Finally, in view of the circumstances of this case, we do not consider that the *ex parte* meeting between the trial court and defense counsel to settle the forms of the orders and judgments to be entered requires reversal here. The ensuing orders and judgments comport with all of the prior proceedings and rulings

[6]Contrary to Plaintiffs' argument, they were not entitled to a jury trial on damages. 10 Wright, Miller & Kane, Federal Practice and Procedure: *Civil* § 2688 (1983).

and indicate that Plaintiffs were not prejudiced by that *ex parte* meeting.

Affirmed.

GARY VICTOR DUBIN for plaintiffs-appellants.

MICHAEL W. GIBSON (LORRIN B. HIRANO with him on the brief; ASHFORD & WRISTON OF COUNSEL) for Lane.

CATHY A. LEE (WESLEY W. ICHIDA with her on the brief; CASE, KAY & LYNCH OF COUNSEL) for Sinsabaugh and Waterfront.

JAMES A. BURNS

WALTER M. HEEN

HARRY L. TANAKA

No. 11353

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor-Defendant/ Appellee.

CIVIL NO. 70332

ORDER PARTIALLY GRANTING MOTION FOR RECONSIDERATION

This court having considered Plaintiffs-Appellants' motion for reconsideration of the opinion rendered on April 3, 1987, and their

arguments in support thereof, the motion is hereby granted only with respect to Plaintiffs-Appellants' argument that the opinion erroneously affirmed the March 19, 1985 order of the trial court awarding Defendants-Appellees Willis Sinsabaugh and Waterfront Properties, Inc., costs and attorney's fees under Rule 68, Hawaii Rules of Civil Procedure (1980). We find no merit in Plaintiffs-Appellants' other arguments in support of the motion.

DATED: Honolulu, Hawaii, April 22, 1987.

GARY VICTOR DUBIN
on the motion for
plaintiffs-appellants.

JAMES A. BURNS

WALTER M. HEEN

HARRY T. TANAKA

No. 11353

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Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,

Intervenor-Defendant/ Appellee.

ORDER AMENDING OPINION OF THE COURT

Upon consideration of Plaintiffs-Appellants' motion for consideration, and good cause appearing therefore, IT IS HEREBY ORDERED that the opinion of this court entered on April 3, 1987, is amended in the following respects:

(1) The first paragraph of the opinion is amended to read as follows:

> Plaintiffs—Appellants Leon D. Richardson and his wife, Margie J. Richardson (hereinafter the Richardsons), and Copthorne N.V. (Copthorne), a Netherland Antilles corporation (hereinafter where appropriate the Richardsons and Copthorne will be referred to collectively as Plaintiffs), appeal from the order dismissing their complaint against Defendants-Appellees Howard T. Lane (Lane), Willis Sinsabaugh (Sinsabaugh), and Waterfront Properties, Inc. (Waterfront), a Hawaii corporation (hereinafter where appropriate Lane, Sinsabaugh and Waterfront wil be referred to collectively as Defendants), from the default judgments entered against them on the counterclaims of Lane

and Sinsabaugh, and from the trial court's March 19, 1985 order awarding costs and attorney's fees to Sinsabaugh and Waterfront under Rule 68, Hawaii Rules of Civil Procedure (HRCP) (1980). We affirm, except for the order of March 19, 1985, which we order vacated.

(2) The first paragraph of section I of the opinion is amended to read as follows:

When Plaintiffs' counsel informed the trial court that Plaintiffs had instructed him not to participate further in the proceedings and left the courtroom, Plaintiffs effectively abandoned their cause of action and the trial court correctly dismissed the complaint under Rule 41(b), HRCP,[3] for lack of prosecution.

(3) The last paragraph of the opinion is amended to read as follows:

We note also that, in view of the circumstances of this case, we do not consider that the *ex parte* meeting between the trial court and defense counsel to settle the forms of the orders and judgments to be entered requires reversal here. The ensuing orders and judgments comport with all of the prior proceedings and rulings and indicate that Plaintiffs were not prejudiced by that *ex parte* meeting.

(4) The word "Affirmed" appearing at the end of the opinion is stricken and the following language and footnote are added in its stead:

IV.

On March 19, 1985, the trial court ordered Plaintiffs to pay $12,297.49 to Sinsabaugh and Waterfront as costs and attorney's fees they had argued were due them under Rule 68, HRCP.[7] The trial court erred. Rule 68's provision requiring the offeree to pay the offeror's costs and attorney's fees is not applicable in a case where judgment is rendered against the offeree. *See Crown Properties, Inc. v. Financial Security Life Ins. Co.*, 6 Haw. App. ___, 712 P.2d 504 (1985).

[7] HRCP Rule 68 (1980) provides:

OFFER OF JUDGMENT. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is

The judgment below is affirmed, except for the order of March 19, 1985, which we hereby order vacated.

The clerk of the court is directed to incorporate the foregoing changes in the original opinion.

DATED: Honolulu, Hawaii; April 22, 1987.

GARY VICTOR DUBIN for plaintiffs-appellants.

JAMES S. BURNS

WALTER M. HEEN

MICHAEL W. GIBSON (LORRIN B. HIRANO with him on the brief; ASHFORD & WRISTON OF COUNSEL) for Lane.

HARRY T. TANAKA

CATHY A. LEE (WESLEY W. ICHIDA with her on the brief; CASE, KAY & LYNCH OF COUNSEL) for Sinsabaugh and Waterfront.

(Footnote Continued)
accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

No. 11353

IN THE SUPREME COURT OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Petitioners-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, and WATERFRONT PROPERTIES, INC., a Hawaii corporation,
Respondents-Appellees,

and

JOHN DOES 1-10,, et al.,
Defendants,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Respondent-Intervenor/ Appellee.

CIVIL NO. 70332

APPLICATION FOR WRIT OF CERTIORARI

INTERMEDIATE COURT OF APPEALS

HONORABLE JAMES. S. BURNS, WALTER M. HEEN and HARRY T. TANAKA, Judges

ORDER

Pertitioners-Appellants' Application for Writ of Certiorari filed

May 4, 1987 is hereby denied.

DATED: Honolulu, Hawaii, May 8, 1987.

GARY VICTOR DUBIN
for the writ

FOR THE COURT:
HERMAN T.S. LUM
Chief Justice

No. 11353

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

v.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

APPEAL FROM THE:
1) ORDER GRANTING IN PART AND DENYING IN PART, DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS FILED JANUARY 28, 1985,
2) ORDER DISMISSING COMPLAINT FILED JANUARY 25, 1985,
3) JUDGMENT FILED JANUARY 24, 1985
4) JUDGMENT FILED JANUARY 24, 1985
5) FINDS OF FACT AND CONCLUSIONS OF LAW FILED JANUARY 24, 1985
6) ORDER GRANTING MOTION FOR ORDER TO DEPOSIT PAYMENTS INTO THE COURT FILED JANUARY 14, 1985
7) ORDER MODIFYING AND AMENDING ORDER TO DEPOSIT PAYMENT INTO THE COURT FILED JANUARY 28, 1985,
8) ORDER DENYING PLAINTIFF'S MOTION FOR

Relief from Order Dismissing Complaint and From Judgment for Defendants, for New Trial, and for Stay of Judgment Filed February 26, 1985,
9) Order Granting Defendant Howard T. Lane's Motion for Award of Attorneys Fees Filed March 6, 1985,
10) Order Granting Defendants Willis Sinsabaugh and Waterfront Properties, Inc.'s Motion for Costs and Attorneys' Fees filed March 19, 1985,
11) Order Denying Plaintiffs' Motion for Order Vacating and Setting Aside Default Judgment, Order Dismissing Complaint, and Expert Witness Preclusion Order Filed March 19, 1985 and
12) Ruling Refusing to Disqualify Judge Edwin Y. Sasaki Pursuant to

SECTION 601-7(B)
AFFIDAVIT, FROM ALL
PROCEEDINGS HEREIN,
DECIDED JANUARY 21,
1985, BY JUDGE SASAKI

FIRST CIRCUIT COURT

HONORABLE
EDWIN Y. SASAKI
Judge

HONORABLE
PHILIP T. CHUN
Judge

JUDGMENT ON APPEAL

Of Counsel
ASHFORD & WRISTON

MICHAEL W. GIBSON
LORRIN B. HIRANO
235 Queen Street
P.O. Box 131
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Tel. No. 524-4787

Attorneys for Defendants-Appellees
Howard T. Lane, Willis Sinsabaugh
and Waterfront Properties, Inc.

No. 11353

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

JUDGMENT ON APPEAL

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Intermediate Court of Appeals entered herein on April 3, 1987, the Order Partially Granting Motion

for Reconsideration entered herein on April 22, 1987, and the Order Amending Opinion of the Court entered herein on April 22, 1987, the Judgment of the lower court is affirmed, except for the March 19, 1985 Order Granting Defendants Willis Sinsabaugh and Waterfront Properties, Inc.'s Motion for Costs and Attorneys' Fees, which is vacated.

DATED: Honolulu, Hawaii; May 19, 1987.

BY THE COURT:

DARRELL M. PHILLIPS
Of Clerk

APPROVED:

WALTER M. HEEN
Judge

No. 11353

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

APPEAL FROM THE:
1) ORDER GRANTING IN PART AND DENYING IN PART, DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS FILED JANUARY 28, 1985,
2) ORDER DISMISSING COMPLAINT FILED JANUARY 25, 1985,
3) JUDGMENT FILED JANUARY 24, 1985
4) JUDGMENT FILED JANUARY 24, 1985
5) FINDS OF FACT AND CONCLUSIONS OF LAW FILED JANUARY 24, 1985
6) ORDER GRANTING MOTION FOR ORDER TO DEPOSIT PAYMENTS INTO THE COURT FILED JANUARY 14, 1985
7) ORDER MODIFYING AND AMENDING ORDER TO DEPOSIT PAYMENT INTO THE COURT FILED JANUARY 28, 1985,
8) ORDER DENYING

Plaintiff's Motion for Relief from Order Dismissing Complaint and From Judgment for Defendants, for New Trial, and for Stay of Judgment Filed February 26, 1985,
9) Order Granting Defendant Howard T. Lane's Motion for Award of Attorneys Fees Filed March 6, 1985,
10) Order Granting Defendants Willis Sinsabaugh and Waterfront Properties, Inc.'s Motion for Costs and Attorneys' Fees filed March 19, 1985,
11) Order Denying Plaintiffs' Motion for Order Vacating and Setting Aside Default Judgment, Order Dismissing Complaint, and Expert Witness Preclusion Order Filed March 19, 1985 and
12) Ruling Refusing to Disqualify Judge Edwin Y. Sasaki Pursuant to

SECTION 601-7(B)
AFFIDAVIT, FROM ALL
PROCEEDINGS HEREIN,
DECIDED JANUARY 21,
1985, BY JUDGE SASAKI

FIRST CIRCUIT COURT

HONORABLE
EDWIN Y. SASAKI
Judge

HONORABLE
PHILIP T. CHUN
Judge

NOTICE OF ENTRY OF JUDGMENT ON APPEAL
CERTIFICATE OF SERVICE

Of Counsel:
ASHFORD & WRISTON

MICHAEL W. GIBSON
LORRIN B. HIRANO
235 Queen Street
P.O. Box 131
Honolulu, Hawaii 96810
Tel. No. 524-4787

Attorneys for Defendants-Appellees
Howard T. Lane, Willis Sinsabaugh
and Waterfront Properties, Inc.

No. 11353

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

v.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

NOTICE OF ENTRY OF JUDGMENT ON APPEAL AND CERTIFICATE OF SERVICE

NOTICE OF ENTRY OF JUDGMENT ON APPEAL

TO: THE HONORABLE PRESIDING JUDGES OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII;

PLEASE TAKE NOTICE that the Intermediate Court of Appeals has entered the following Judgment on Appeal:

> Pursuant to the Opinion of the Intermediate Court of Appeals entered herein on April 3, 1987, the Order Partially Granting Motion for Reconsideration entered herein on April 22, 1987, and the Order Amending Opinion of the Court entered herein on April 22, 1987, the Judgment of the lower court is affirmed, except for the March 19, 1985 Order Granting Defendants Willis Sinsabaugh and Waterfront Properties, Inc.'s Motion for Costs and Attorneys' Fees, which is vacated.

DATED: Honolulu, Hawaii; May 19, 1987.

BY THE COURT:

DARRELL M. PHILLIPS
Of Clerk

The form of the foregoing notice is approved and IT IS ORDERED that the same issue forthwith.

DATED: Honolulu, Hawaii; May 19, 1987.

WALTER M. HEEN
Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within document was duly served by hand delivery on the following persons at their respective addresses shown below.

GARY VICTOR DUBIN, ESQ.
345 Queen Street, Suite 800
Honolulu, Hawaii 96813
Attorney for Plaintiff-Appellants

CATHY A. LEE
Case & Lynch
Suite 2500
Gorsvenor Center, Mauka Tower
737 Bishop Street
Honolulu, Hawaii 96813
Attorney for Defendant-Appellees
Willis Sinsabaugh and
Waterfront Properties, Inc.

DATED: Honolulu, Hawaii; April 23, 1987.

for
LORRIN B. HIRANO

Of Counsel:
ASHFORD & WRISTON

MICHAEL W. GIBSON 1382-0
LORRIN B. HIRANO 3685-0
235 Queen Street
P. O. Box 131
Honolulu, Hawaii 96810
Tel. No. 524-4787

Attorneys for Defendant
HOWARD T. LANE

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON et. al.,	CIVIL NO. 70332
Plaintiffs,	**ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS**
vs.	
HOWARD T. LANE, et al., *Defendants.*	

ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS

This matter having duly come on for hearing before the Honorable Edwin Y. Sasaki on January 17, 1985, and Plaintiffs and Defendants having been represented by their respective counsel, the Court having heard arguments by counsel and having reviewed the

memoranda filed herein and having been fully advised in the premises, and for good cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Howard T. Lane's Motion to Dismiss and for Sanctions is granted in part, and denied in part, and Plaintiffs are prohibited from introducing any testimony of or any evidence or exhibits through Jack Lipman, Steve Hidano or Joseph Dobrowolski.

DATED: Honolulu, Hawaii; January 27, 1985.

EDWIN Y. SASAKI (SEAL)
Judge of the above-entitled
Court

APPROVED AS TO FORM:

WESLEY ICHIDA
CATHY A. LEE
Attorney for Defendants
Willis Sinsabaugh and
Waterfront Properties, Inc.

WALTER BEH, II
CHERYL A. NAKAMURA
Attorneys for Intervenor/
Defendant
The Fidelity Standard Life
Insurance Company

GARY VICTOR DUBIN,
attorney for plaintiffs,
did not sign

Of Counsel:
ASHFORD & WRISTON

MICHAEL W. GIBSON 1382-0
LORRIN B. HIRANO 3685-0
235 Queen Street
P. O. Box 131
Honolulu, Hawaii 96810
Tel. No. 524-4787

Attorneys for Defendant
HOWARD T. LANE

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON et. al.,

Plaintiffs,

vs.

HOWARD T. LANE, et al.,

Defendants.

CIVIL NO. 70332

ORDER MODIFYING AND AMENDING ORDER TO DEPOSIT PAYMENTS INTO THE COURT

ORDER MODIFYING AND AMENDING ORDER TO DEPOSIT PAYMENTS INTO THE COURT

This matter having duly come on for hearing before the Honorable Edwin Y. Sasaki on January 18, 1985, and Plaintiffs and Defendants having been represented by their respective counsel, the Court having heard arguments by counsel and having reviewed the memoranda filed herein and having been fully advised in the premises, and for good cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order Granting Motion for Order To Deposit Payments Into The Court, entered on January 14, 1985, is modified and amended, and Plaintiffs shall deposit, before 9:30 A.M., January 21, 1985, the sum of $743,750.00 in cash, in cash equivalents, or in such other security of equivalent value and liquidity as this Court may approve, into a trust fund to be accepted and held by the Clerk of the First Circuit Court.

DATED: Honolulu, Hawaii; January 27, 1985.

EDWIN Y. SASAKI (SEAL)
Judge of the above-entitled
Court

APPROVED AS TO FORM:

WESLEY ICHIDA
CATHY A. LEE
Attorney for Defendants
Willis Sinsabaugh and
Waterfront Properties, Inc.

WALTER BEH, II
CHERYL A. NAKAMURA
Attorney for Intervenor/
Defendant
The Fidelity Standard Life
Insurance Company

[GARY VICTOR DUBIN,
Attorney for Plaintiffs,
appended to the order
the statement: "Decline to
sign as the substance and
form of this order are
unconstitutional"]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

ORDER DISMISSING COMPLAINT

ORDER DISMISSING COMPLAINT

This case having come for jury trial before the Honorable Edwin Y. Sasaki on January 21, 1985 at 9:30 a.m. and GARY V. DUBIN having temporarily appeared for Plaintiffs and MICHAEL W. GIBSON and LORRIN B. HIRANO having appeared for Defendant Howard T. Lane and Cross-Claimants Howard T. Lane and Willis Sinsabaugh, and

WESLEY W. ICHIDA and CATHY A. LEE having appeared for Defendants Willis Sinsabaugh and Waterfront Properties, Inc., and Plaintiffs having failed to appear and their counsel having voluntarily left the courtroom without being excused by the Court after the panel of jurors had been called into the Courtroom and roll call had been taken and prior to commencement of jury selection and Plaintiffs having failed to prosecute or defend thereafter, and all Defendants having been prepared to go forward with the case,

THEREFORE, Plaintiffs' complaint is dismissed with prejudice on the merits and Defendants are given leave to move for taxation of costs and reasonable and proper attorneys' fees against Plaintiffs.

DATED: Honolulu, Hawaii; January 25, 1985.

EDWIN Y SASAKI (SEAL)
Judge of the above-entitled
Court

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants-Appellees,

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

CIVIL NO. 70332

JUDGMENT

JUDGMENT

This cause having come on for proof hearing before the Honorable Edwin Y. Sasaki on January 21, 1985, and proof having been shown to the satisfaction of the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment in favor of Defendants Howard T. Lane and Willis Sinsabaugh is hereby entered as follows:

1. Defendant Howard T. Lane is entitled to possession of the subject premises described in the Complaint and a Writ of Possession against Plaintiffs shall be issued upon presentation by Defendant Howard T. Lane effective forthwith.

2. Complaint is dismissed with prejudice.

3. All right, title and interest of Plaintiffs in the real property designated as 10 Poipu Place is terminated and Defendant Howard T. Lane is permitted to retain all sums paid under the Agreement of Sale between Defendant Howard T. Lane and Plaintiffs Leon D. Richardson and Margie J. Richardson dated June 30, 1981 and the Agreement of Sale is cancelled and any rights of Plaintiffs under the Agreement of Sale or assignments thereof are terminated.

4. Defendants Howard T. Lane and Willis Sinsabaugh are entitled to judgment against Plaintiff Leon D. Richardson in the sum of $1.00 each for Leon D. Richardson's defamatory and tortious conduct.

5. Defendants are given leave to move for taxation of costs and attorneys' fees against Plaintiffs.

DATED: Honolulu, Hawaii; January 23, 1985.

EDWIN Y. SASAKI (SEAL)
Judge of the above-entitled
Court

APPROVED AS TO FORM:

WESLEY W. ICHIDA
CATHY A. LEE
Attorneys for Defendants
Willis Sinsabaugh and
Waterfront Properties, Inc.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON et. al.,
Plaintiffs,

CIVIL NO. 70332

JUDGMENT

vs.

HOWARD T. LANE, et al.,
Defendants.

and

THE FIDELITY STANDARD LIFE INSURANCE COMPANY,
Intervenor/Defendant.

JUDGMENT

This case having come for jury trial before the Honorable Edwin Y. Sasaki on January 21, 1985 at 9:30 a.m. and GARY V. DUBIN having initially appeared for Plaintiffs and Plaintiffs not having appeared, and MICHAEL W. GIBSON and LORRIN B. HIRANO having appeared for Defendant/Counterclaimant Howard T. Lane and Defendant/Counterclaimant having appeared, and WESLEY W. ICHIDA and CATHY A. LEE having appeared for Defendants Willis Sinsabaugh and Waterfront Properties, Inc. and Willis Sinsabaugh having appeared in both his individual capacity and as the authorized representative of Waterfront Properties, Inc., and Plaintiffs' counsel having voluntarily left the Courtroom without being excused by the Court after the panel of jurors had been called into the Courtroom and roll call had been taken but before jury selection had begun, and Plaintiffs having failed to prosecute or defend thereafter, and all Defendants having been prepared to go forward with the case, the Court having ordered that judgment be entered dismissing Plaintiffs' Complaint with prejudice,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendants Willis Sinsabaugh and Waterfront Properties, Inc. and against Plaintiffs as follows:

1. Plaintiffs' Complaint against Defendants Willis Sinsabaugh and Waterfront Properties, Inc. be and the same is hereby dismissed with prejudice and Plaintiffs shall take nothing on their claims against said Defendants; and

2. Defendants Willis Sinsabaugh and Waterfront Properties, Inc. are given leave to move for taxation of costs and reasonable and proper attorneys' fees against Plaintiffs.

DATED: Honolulu, Hawaii; January 24, 1985.

EDWIN Y. SASAKI
Judge of the above-entitled
Court

APPROVED AS TO FORM:

MICHAEL W. GIBSON
LORRIN B. HIRANO
Attorneys for Defendant
Howard T. Lane and
Counter-Claimants Howard
T. Lane and Willis
Sinsabaugh

Of Counsel:
ASHFORD & WRISTON

MICHAEL W. GIBSON 1328-0
LORRIN B. HIRANO 3685-0
235 Queen Street
P.O. Box 131
Honolulu, Hawaii 96810
Tel. No.: 524-4787

Attorneys for Defendant
Howrd T. Lane and Cross-
Claimants Howard T. Lane
and Willis Sinsabaugh

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,
Plaintiffs-Appellants,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,
Defendants,

CIVIL NO. 70332

FINDINGS OF FACT AND CONCLUSIONS OF LAW

and

THE FIDELITY STANDARD
LIFE INSURANCE COMPANY,
Intervenor/Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having come on for jury trial before the Honorable Edwin Y. Sasaki on January 21, 1985 at 9:30 a.m. and GARY V. DUBIN having temporarily appeared for Plaintiffs and MICHAEL W. GIBSON and LORRIN B. HIRANO having appeared for Defendant Howard T. Lane and Cross-Claimants Howard T. Lane and Willis Sinsabaugh, and WESLEY W. ICHIDA and CATHY A. LEE having appeared for Defendants Willis Sinsabaugh and Waterfront Properties, Inc., and Plaintiffs having failed to appear and their counsel having voluntarily left the courtroom without Court approval after jury role was called and prior to commencement of jury selection and Plaintiffs having failed to prosecute or defend thereafter, judgment was entered against Plaintiffs dismissing with prejudice on the merits their complaint and their defenses to Defendants counterclaim and it appearing to the satisfaction of the court that all parties were duly served, and after considering the pleadings and testimony of Howard T. Lane and Willis Sinsabaugh and after hearing statements of counsel, and the Court, being satisfied that it has jurisdiction over all parties and of the subject matter of this case and that the allegations of Defendants' counterclaims are true and that the relief prayed for should be granted, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff COPTHORNE N. V. (hereinafter "Copthorne") is a Netherland Antilles corporation. Plaintiffs LEON D. RICHARDSON and MARGIE J. RICHARDSON (hereinafter "Richardsons") are residents of Hong Kong, and citizens of Australia.

2. Defendants HOWARD T. LANE (hereinafter "Lane") and

WILLIS SINSABAUGH (hereinafter "Sinsabaugh") are residents of the City and County of Honolulu, State of Hawaii.

3. On or about June 30, 1981, Richardsons entered into that certain Agreement of Sale with Defendant Lane for the purchase and sale of Defendant Lane's leasehold interest in certain real property designated as 10 Poipu Place.

4. Richardsons paid to Lane the $500,000 down payment due under the Agreement of Sale and the monthly installments through the January 1982 installment.

5. On or about December 31, 1981, Richardsons assigned to Copthorne their interest in the Agreement of Sale with Lane.

6. Under the terms of the Consent to Assignment, Lane reserved all his rights against Richardsons under the Agreement of Sale including but not limited to recover all sums and expenses incurred to enforce the terms and conditions of the Agreement of Sale including attorneys' fees.

7. Plaintiffs failed to make the monthly installments due under the Agreement of Sale after the January 1982 installment and also failed and refused to make the balloon payment of $850,000 due on January 13, 1983.

8. Plaintiffs were notified that their continuing or future delinquencies in the payments due under the Agreement of Sale constituted a default under the Agreement of Sale.

9. There is a reasonable relationship between the amount of payments retained by Defendant Lane and the amount of Defendant Lane's actual damages which include the interest due during Plaintiffs equitable ownership, the estimated costs of resale of the property, payments other than principal and interest which Plaintiffs failed to make and expenses and damages which Defendant Lane is entitled to under the Agreement of Sale.

10. Plaintiffs acted in bad faith in not repairing the premises and depositing into an escrow or court the funds due under the Agreement of Sale as promised in the letter dated February 8, 1982, from Leon D. Richardson to Howard T. Lane and ordered by this court.

11. On or about February 24, 1982, Plaintiff Leon D. Richardson maliciously prepared and composed a telex and concerning Lane and Sinsabaugh.

12. At the time of said defamatory publication, Plaintiff Leon D. Richardson knew or should have known that the statements made therein were untrue.

13. Defendants Lane and Sinsabaugh have always enjoyed a good reputation for honesty and truthfulness.

14. The act of Plaintiff Leon D. Richardson in publishing the document was willful and intentional and committed for the purpose of harrassing and annoying Defendants Lane and Sinsabaugh.

15. The acts of Plaintiff Leon D. Richardson in publishing the document were reckless, wanton, irresponsible, willful and malicious.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over all the parties in this action and all the claims presented therein.

2. Said Agreement of Sale was and is valid and enforceable according to its terms, without set off, claims or other affirmative defenses.

3. Defendant Howard T. Lane is permitted to retain all sums paid under the Agreement of Sale.

4. Defendant Howard T. Lane is entitled to possession of the premises which are the subject of the Agreement of Sale.

5. A Writ of Possession against Plaintiffs effective forthwith shall issue returning possession to Defendant Howard T. Lane.

6. All right, title and interest of Plaintiffs in the real property designated as 10 Poipu Place is terminated and Defendant Howard T. Lane is permitted to retain all sums paid under the Agreement of Sale between Defendant Howard T. Lane and Plaintiffs Leon D. Richardson and Margie J. Richardson dated June 30, 1981 and the Agreement of Sale is cancelled and any rights of Plaintiffs under the Agreement of Sale or assignments thereof are terminated.

7. Defendants Howard T. Lane and Willis Sinsabaugh are entitled to judgment against Plaintiff Leon D. Richardson in the sum of $1.00 each for Leon D. Richardson's defamatory and tortious conduct.

8. Defendants are given leave to move for taxation of costs and attorneys' fees against Plaintiffs.

DATED: Honolulu, Hawaii; January 23, 1985.

EDWIN Y. SASAKI (SEAL)
Judge of the above-entitled
Court

APPROVED AS TO FORM:

WESLEY W. ICHIDA
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Waterfront Properties, Inc.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON, et al., *Plaintiffs-Appellants,*
CIVIL NO. 70332

vs.

HOWARD T. LANE, et al., *Defendants.*

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE EDWIN Y. SASAKI, Assigned Judge, presiding, January 17-18, 1985. Motions.
APPEARANCES:

For the Plaintiffs	Gary V. Dubin, Esq.
For the Defendants Howard T. Lane	Michael W. Gibson, Esq.
Sinsabauch & Waterfront Properties	Wesley W. Ichida, Esq. Cathy A. Lee, Esq.

REPORTED BY:
Regis Taylor RPR, CSR 192
Certified Shorthand Reporter 192
Official Court Reporter
First Circuit Court
State of Hawaii

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21 All right? Now we will here Mr. Gibson's
22 motion.
23 MR. GIBSON: Thank you, Your Honor, my motion
24 deals with the problems which we have had concerning the
25 discovery of the plaintiffs experts.

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By way of background, Your Honor, in June of 1984 I first subpoenaed the — I don't know if that was the first time that I subpoenaed them, but I subpoenaed the plaintiffs experts to appear on June 22, 1984.

Mr. Dubin advised me that his witnesses would not be attending, and I filed a motion for leave to depose his experts on June 20, 1984. Mr. Dubin filed a memorandum in opposition to that motion, and ultimately in, I believe it was, September, there was a stipulation and order entered in this case requiring under certain conditions that plaintiffs would be required to produce their experts.

Nothing happened, so again I subpoenaed their witnesses on October 30, 1984 to appear at various different times beginning with around the day after Thanksgiving weekend, which is November 26th.

We have begun but not completed the deposition of Mr. Lipman. Mr. Lipman had various commitments — the first time we deposed him he hadn't completed his report.

In fact his report which is in that red booklet there is dated December 10, 1984. The first time we deposed him he hadn't even completed it.

The second time we deposed him we were unable to complete his deposition, we did have the completed report but Mr. Lipman had to go to the mainland for Christmas holidays.

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We were told he would come back and we could finish it. We began the depositon of Mr. Hidano.

Mr. Hidano, during his deposition, said, and Mr. Dubin confirmed that certain documents would be provided, just reading from one page, question to Mr. Hidano.

QUESTION: "Do you have those in your file somewhere at your office?

ANSWER: Yes, I do.

QUESTION: Could you please provide those to Mr. Dubin, who will provide them to us?

MR. DUBIN: I will send them to you. I well make them available."

Even as of this morning Mr. Dubin has told me that he doesn't have those documents.

At 3:00 o'clock on the day of Mr. Hidano's deposition the last thing that is in the record:

"Mr. Hidano, it is now 3:00 o'clock, I don't know if you have to leave now, but I am certainly far from finished. If you have to go, I guess we have to stop now and reschedule this.

MR. DUBIN: Well, good, let's do what I suggested. Lets take Lipman's deposition, then perhaps we will be able to do Mr. Hidano's."

We have not finished Mr. Hidano's. In this

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plaintiffs supplemental pre-trial statement filed at 8:29 this morning, in addition to those two witnesses who are listed under list of expert witnesses, although we subpoenaed Steven Mood and Evan Hayase, we have not yet taken their depositions, Your Honor, and this isn't because we have waited to the last minute to do this.

This is in spite of and in direct contradiction to the stipulation and order requiring them to make those witnesses available, and we said throughout, listen, we want to depose your witnesses, and we have been prevented from doing it.

We said we will go beyond the discovery cut-off to do it. I said I will make my experts available, and you make your experts available.

It would be unfair to let them bring these expert witnesses into court without letting us have the opportunity to depose them, and that is all we are asking for.

I suggest that either the Court not let these witnesses testify, strike whatever evidence they are suggesting they would introduce through them or, and I don't want to do this, but I think it is the only alternative, put the trial off for a specific amount of

time, a week, and let us finish these depositions.
But we cannot go to trail on Monday until we

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finish the depositions of their experts. This case involves alleged construction defects. These experts are their number one architect, who has prepared this report, which is the guts of this case, their cost estimator who is supposedly going to provide us with a breakdown of all of these costs of repairs that they say need to be done, and two other witnesses who I am not sure what they are going to say.

Your Honor, it just is a matter that we can not just pass over lightly and say we will proceed without having taken their testimony.

THE COURT: Mr. Ichida, anything that you would like to say?

MR. ICHIDA: Yes, I concur with Mr. Gibson's comments and wish to add the following. I don't have any experts in the same area as these experts here, construction, architects, and those matters. However, because of the potential joint and several liability that my client has with Mr. Gibson's client, I certainly have an interest in completing the depositions of these experts which we have not done yet.

THE COURT: Mr. Dubin?

MR. DUBIN: Your Honor, Mr. Gibson has presented this court with a fairytale. The true facts are that he — frankly this is the first case in 22 years of

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practice of law that I have been in that has over 50 or 60 depositions.

Plaintiffs have provided these before being requested to do so, and it is in the record of this action, all of the reports that we had when we got them.

A dispute arose several months ago because Mr. Gibson wasn't paying our experts and wasn't providing his reports. We then resolved this by a stipulation where we all agreed in good faith that we would let everybody take

everybody's expert deposition.

What happened? We took the deposition of plaintiffs expert, Steven Hidano. We took the deposition of Edward Ida. We took the deposition — these are all plaintiffs experts. Norman Lacayo. We took the deposition of Russell Smith, plaintiffs expert. James Tamara, a plaintiffs expert. Brian Gregg, a plaintiffs expert. Jack Lipman, I believe that there are two transcripts of the rest of his deposition.

This is what has happened in the last month and a half in this case. Helen Price, plaintiffs expert. Jerry Nakagawa, plaintiffs expert.

This represents Mr. Gibson's experts. He let us depose one of his experts. Mr. Vernon, he postponed. Then he told me about week ago in a Mr. Vernon wasn't going to come until he was done with all of our experts, and I

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told with Mr. Gibson that is not the way we are going to play the game. I want some of his experts.

Then when he finally changed his mind and said you can have Mr. Vernon, it is frankly, Your Honor, about a week before the trial.

Now, plaintiffs have 3 or 4 of their experts to take. In addition to that, Mr. Gibson is in violation of the Court's order concerning the turning over of expert documents.

He told me the other day he has his surveyor's report he hasn't made available to us. Plaintiffs counsel needs time to prepare for a meaningful trial in this action, and therefore the only thing that Mr. Gibson said which is correct is that I told him that within the week before the trial I needed time to prepare this case for trial, and as a result I would give up my right to take his experts and we would just proceed to trial.

We have absolutely no objection to his taking our experts. However, he has had, as the Court can visibly see, quite a few of our experts testimony and this hardly looks like a plaintiff that is trying to hide anything,

Your Honor.
If Mr. Gibson wishes to continue it, we would need an additional week to take the experts and we are not opposed to that, but plaintiffs counsel, Your Honor, this

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trial could go on for 6 weeks and the ability to prepare in advance for this trial means to us the possibility of limiting the testimony and the scope.
So Mr. Gibson's continual motions in the record of this action for a dismissal we feel that that would be grossly overreaching.
THE COURT: Mr. Dubin, did Mr. Gibson write to you on January 9th informing you that his experts would be available on the 14th and 15th of January, 1985?
MR. DUBIN: Yes, he did, Your Honor, and I think I got that letter this week, and I informed him that I needed a week to prepare the case for trial, and in addition to that Lipman had to attend something in Los Angeles and just got back. So I have to work with this schedule of my witnesses and Mr. Hidano is on the contractors board, and they have had something going on regarding the settlement of a dispute or something, so I do the very best I can.
THE COURT: Was the order, Judge Chun's order concerning the stipulation for the examination of the experts, complied with?
MR. DUBIN: Your Honor, that stipulation —
THE COURT: He has about 3 or 4 conditions in it.
MR. DUBIN: No, Mr. Gibson has not given us all

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of his reports, but that order of Judge Chun had nothing to do with the cut-off.
We had attempted to see Judge Chun about this the other day, and all we heard Judge Chun say was, well, if it is within the cut-off you have to file for a motion to enlarge time.
Now, the order does not specify that the 30 day

cut-off —

THE COURT: The conditions in that order does not pertain to cut-off.

MR. DUBIN: That is correct, Your Honor.

THE COURT: It pertains to the payment of the experts and what not.

MR. DUBIN: The only —

THE COURT: Have those conditions been complied with by Mr. Gibson?

MR. DUBIN: Your Honor, he has reports that he has not turned over and we have attempted informally to adjust to everybody's schedule including Mr. Gibson's and the experts — and I would not exactly fault Mr. Gibson, except he did tell me last week he was withholding his experts until he finished ours, which I think was unfair, but he withdrew that.

But he does have some of the reports and he has not given them to us. To that extent he has not complied

with the stipulation.

THE COURT: The Court is going to take a short recess.

(Recess.)

THE COURT: Mr. Gibson, the Court has some questions, pertaining to the order of Judge Chun. It says each party must first pay all past deposition fees of all experts.

Did you pay that?

MR. GIBSON: Your Honor, we have paid all, with the exception of Mr. Lacayo. I submitted a memorandum to the Court on that matter, and Mr. Dubin, as far as I know, has not submitted any memorandum with respect to that.

There is a dispute as to whether that had to be paid, and the Court suggested that we submit memorandum on that, that is what I did.

THE COURT: All right. Number two, it says each party must first turn over all written reports of each of its experts to all counsel and all such furtther written

request received as a continuing condition for being permitted leave to take further oral depositions of experts in this action.

MR. GIBSON: What Mr. Dubin is referring to is a survey done by Gordon Mata, Associates with respect to the sewer easement. It is true that I have not given him

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that, and I do not have that yet from my expert, but I am told that I will be getting it, and I haven't provided it because I don't have it yet, but I am told that it exists.

THE COURT: All right. Each party must bear the reasonable attendance and preparation fee of all further experts proposed by each within 30 days of the deposition.

MR. GIBSON: With respect to that, Your Honor, every bill submitted to me I have paid forthwith. As far as I know the bills that I have submitted to Mr. Dubin have not been paid yet.

THE COURT: It says further, expert depositions are to be held at the convenience and agreeable to all parties in advance of notice thereof.

Mr. Dubin, which one of these conditions do you say Mr. Gibson —

MR. DUBIN: Two days ago he told me that he had the Mata report. That is the one. Also the —

THE COURT: His request for deposing your client or the expert was more than two days ago, isnt' that correct?

MR. GIBSON: I think, Your Honor, I got that on Monday, and our position openly on that was that this order did not stay the 30 day cut-off period. We had just agreed —

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THE COURT: I agree with you, the order gave you leave to take depositions up to the time of trial.

MR. DUBIN: I don't think it says —

THE COURT: It says, experts depositions are to be held at a time convenient and agreeable to all of the

parties in advance of the noticing thereof.
There is no cut-off date. I agree with you
THE COURT: That was never interpreted by us, Your Honor, to waive the cut-off date. It only came — what happened was — that was months before we got to the 30 day cut-off date.
MR. GIBSON: Your Honor, all of my subpoenas to all of his experts were out before the cut-off date. When they would appear, if it were to be some date other than the date on which they were required to be there pursuant to the subpoena, was a matter agreed upon between Mr. Dubin and I, for his convenience and my convenience and the witness' convenience.
THE COURT: And you felt experts that received Mr. Gibson's subpoenas appeared for their depositions?
MR. GIBSON: That is not true, Your Honor, we have not seen Mr. Hayasi and Mr. Moon.
MR. DUBIN: Well, you know that they were out of town at that time.
THE COURT: Just a moment. If you want to

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argue among yourselves, you go out in the corridor and argue.
MR. DUBIN: All right. Your Honor, what it boils down to is that we tried to reach agreement on all of the depositions. I was allowed the take one of his experts, he had all of my experts come.
He wanted more and more of their time and it got down to the last week before the trial, and I told him, Your Honor, that I needed some time to prepare the case for trial and I had waited an awfully long time.
Our objection is not that Mr. Gibson should not be permitted to take more deposition, but counsel has to have some time to prepare the case for trial.
He waited until the very end and we were supposed to do it the week before when he imposed the condition that he was to go first and by the time he withdrew that, it was earlier this week, so —

MR. GIBSON: Your Honor, I really feel I have to respond to that. If the Court doesn't have it, as I told the Court earlier, I filed a motion for leave to depose these experts and attached — that motion was filed June 20, 1984.

Attached to that motion is my affidavit, together with correspondence, which shows that it goes back as far as March 1984, when I first began trying to schedule

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these depositions.

In my affidavit I point out that I had tried to schedule them. We couldn't reach an agreement. First he said yes, then he said no. So I finally gave up and filed a motion. That is when we got this stipulation and order so it is not a matter of waiting until the last minute.

MR. DUBIN: The history is already documented and I have answered that. That is why Judge Chun did not grant his motion for sanctions beore. He has withheld his experts from us, but I see no benefit in arguing the past.

The issue here is that they have taken — this, to me, represents — he has more experts he refused to supply us with, saying that we were to go first, when that was not in the order, but then he withdrew that, and when I had notice that he was all set to go again, and we were preparing for trial and have clients coming in from Hong Kong, and I have to prepare them.

It is as simple as that, and didn't mean that to be in violation of any court order. We went on for months of these depositions. It didn't say that Mr. Gibson had the right to take Mr. Lipman's deposition for an entire week.

We provided him with the information and details of every condition. His experts made no inspection.

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They broke into no walls. They just looked for a couple of hours visibly, and frankly their expert testimony is really less than useful. Ours is the only

experts that actually did the type of examination necessary, and we have shared all of that information with Mr. Gibson, I don't know what more we can do.

If he wants to take more depositions, it would be all right for us to let him take some more depositions next week.

THE COURT: That is too late right now. Mr. Dubin, Mr. Gibson, when the court says the deposition is permitted to be taken, that means the deposition is permitted to be taken until the deposition is completed.

The court believes from hearing both counsel argue and reviewing the records that you have failed to comply with the order of the court. Therefore, the sanction that the Court is going to impose in this case is that the Court is going to prohibit you from permitting Mr. Lipman — or is going to prohibit Mr. Lipman, Mr. Hidano and Mr. Peralski from testifying in this trial.

MR. DUBIN: Your Honor, let me hear say this, those are our major experts. Without them, we cannot go to to trial.

THE COURT: It is up to you how you proceed. The Court is prohibiting them from testifying.

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Court is adjourned.

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Wednesday, January 18, 1985, 8:35 A.M., Honolulu, Hawaii.

THE CLERK: Civil 70332, Leon D. Richardson, et al versus Howard T. Lane, et al, Motion to Dismiss.

MR. GIBSON: Good morning, Your Honor. Your Honor, Loren Hirano and Michael Gibson for defendant Howard Lane.

MS. LEE: Cathy Lee on behalf of Waterfront Properties and Sinsabauch.

THE COURT: The record will note that it is now 8:35. Mr. Gibson, did you serve notice upon all of the parties concerning this hearing this morning?

MR. GIBSON: Yes, I did. Your Honor, and if

Your Honor will recall, we also reminded all of the parties at the pre-trial conference yesterday morning held at 8:30 in your chambers, that this motion was to be heard this morning.

I know Mr. Dubin is aware of the motion this morning.

THE COURT: All right. Mr. Dubin is not here. Mr. Gibson, this order was just entered not to long ago.

MR. GIBSON: Yes, Your Honor, a brief background, and I would like to submit those documents into the record.

This motion was argued on September 19th. So

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the plaintiffs had knowledge that there was a possibility this order might be entered on that date, September 19th. On — here is Mr. Dubin, Your Honor.

MR. DUBIN: I am sorry to be late, Your Honor.

THE COURT: All right, Mr. Dubin.

MR. GIBSON: On December 5th I received a telephone call from Randal of Judge Chun's courtroom, and the note says "re: Richardson vs. lane, motion for order to deposit payments into court was granted, we are to prepare the order."

On December 7th — well, going back, on December 6th I attempted to give to Mr. Dubin a copy of that order during a deposition. He indicated that he did not want me to hand it to him at that time.

So I mailed it to him on the 7th of December. On the 10th of December Mr. Dubin wrote a letter to me with a copy to this Court indicating that he had received the draft of the order on December 7th.

On December 12th Mr. Dubin wrote a letter to Philip Chun saying that he had attepted to discuss the matter of the payments, the order, into court and basically that we had not reached an agreement and he did not agree with my proposed order.

On December 12th I wrote a letter to Mr. Dubin with a copy to the Judge saying I suggested that Mr. Dubin

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either submit his objections to my proposed order or submit his own proposed order as provided in the rules.

On the 13th I wrote a letter to the Judge saying that I did not agree with Mr. Dubin's objections, that if the Court was so inclined, I was willing to submit another order saying exactly what the amount was, and setting a deadline that the amount should be paid into court before the commencement of this trial.

That ws my letter of December 13th. On December 18th Mr. Dubin indicated to the Court that he was still trying to meet with me to discuss the terms.

So as to avoid any appearance of impropriety, I agreed to meet with Mr. Dubin. On the 24th of January, and he sets forth that —

THE COURT: The 24th of January?

MR. GIBSON: Excuse me, the 24th of December, the day before Christmas. Mr. Dubin wrote a letter to the Court saying we have agreed to meet on Monday, December 24th, "and I will return to Your Honor on whether and to what extent we agree on the proper wording of the order."

On December 26th, one day after Christmas, Mr. Dubin wrote a voluminous letter to the Court indicating that we had had our meeting, and that we had not reached an agreement.

The reason we had not reached an agreement was

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I asked Mr. Dubin, forget about what conditions we are talking about, is your client going to or not going to put the amount of money into court.

He said we cannot agree on what that amount is. I said, if we cannot agree on that, as far as I am concerned I will submit my order.

We did that, so on January 14th the Court signed the order. I submit to the Court that Mr. Dubin's clients have had a long time to look at this. They say they are uanble to do it because of the situation of Deak Perrera in Hong Kong.

Your Honor, we have a personal financial statement signed by Mr. and Mrs. Richardson wherein they indicate as follows, and this was at the time of the closing.

"We have in the name of Leon Richardson and Margie Richardson certificates of deposit in Bank of America Hong Kong in excess of one million US; Bank of America branch San Francisco CD's in excess of 350,000: Bank of Canton-Hong Kong, certificate of deposit in excess of 100,000; Bank of Montreal, in excess of 20,000; the Banco National de Mexico, equivalent — in excess of one million dollars; Swiss Bank Corporation Lucerne, certificate of deposit in excess of one-half million; gold assets 425 Krugerands in deposit in vault of Swiss bank and

50 Krugerands in deposit in vault of Deak Perrera Hong Kong. We have 50,000 Hong Kong in an interest bearing account in American Express Bank in Hong Kong; miscellaneous deposits in New Sourth Wales, Drummond, Australia; Bank of Montreal; Bank of Canton; Bank of America."

Your Honor, this is not a question of they are unable to put up the money because they don't have the funds, and because of this situation at Deak Perrera.

If what they say is true, they have money all over the world. If what they say isn't true, the situation is this: we have a citizen of the United States, resident of Hawaii, who has got a lawsuit going against people who used to be citizens of the United States who moved out of this country, give up their citizenship for tax reasons, moved to Hong Kong, have no assets in the United States or so they say, at least no assets in Hawaii, and we don't have any ability to collect on a judgment, if we should succeed in our trial.

That is why this order is appropriate, and that is why this Court should impose the sanctions which I have asked for, and I would like to make these various correspondence a part of the record, and I will submit them

at this time.
THE COURT: Has Mr. Dubin looked at them?

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MR. DUBIN: Your Honor, I have no way of knowing unless I consult my files whether these contain all of the letters, and I object to a personal financial statement four years ago being considered as evidence by this court in the resolution of in matter today, when we don't even have an evidentiary hearing, and Mr. Gibson has done the same thing he did yesterday, provided on record statements of fact that are absolutely false, and it makes it difficult for counsel to counter such statements without the opportunity for an evidentiary hearing.
If Your Honor wishes to pursue this, I would ask or request an evidentiary hearing.
THE COURT: The documents will be received by the Court. Mr. Dubin?
MR. GIBSON: May I point out one other thing, Your Honor?
THE COURT: Yes.
MR. GIBSON: Mr. Hirano checked this morning and the funds are — not one single cent is on deposit, so this isn't a question of a good faith effort to put up some money. There is no money on deposit.
THE COURT: Before we get to you, Mr. Dubin, Miss Lee, are you going to say anything.
MS. LEE: No, Your Honor.
THE COURT: Mr. Dubin?

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MR. DUBIN: Your Honor, if the Court wil bear with me, today I intend to make a full record of this matter, and a transcript of this proceeding.
My office received an order for the first time signed by Judge Chun on January the 17, 1985 that bears a printed meter postmark of January 15, 1985.
Mr. Gibson filed this motion to dismiss the day before I even received the order of this Court. I have had approximately less than 24 hours to examine these papers

for a motion to dismiss a case that my clients have spent several hundred thousand dollars in legal feast, $40,000 or more dollars in expert cost, and have litigated this for three years.

Mr. Gibson forgot to tell you that his client is in bankruptcy. My client, Your Honor, has relied upong the order of Judge Sodetani issued two years ago in this court that specified that no payments would have to be placed into this Court.

My clients are entering their 70's, and despite Mr. Gibson's statement of his knowledge about their arranging their matters for tax purposes, my clients have done their estate planning like everyone else who enters into their 70's and their financial statement is considerably different than what Mr. Gibson might present to this Court today.

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When this decision was made, Your Honor, it was made after a confusion where Mr. Gibson filed this and went to one Judge and another Judge, and then when J Chun's clerk indicated that the Court had approved this, I then raised with the Court a number of specific issues, and by the way I have been informed that the Court may have lost the file and I do not know if Judge Chun has even read the letters which have been submitted now to this Court.

I understand Mr. Gibson — they couldn't even find the order, and he had to go and submit another order. My information is that the order that Mr. Gibson submitted that was signed was different than the order submitted pursuant to the Circuit Court rules, and therefore is a violation of the circuit court rules.

I pointed out for the record to Judge Chun that first, no specifics amount is specified and this creates a problem because my client has funds in Australia and you have to apply the Bank of Canberra to replace funds, and it takes about 90 days, and you have to specity the amount.

Now, the order says that all funds — it says deposit all payments due under the agreement of sale. Our

position is, Your Honor, that there are no payments due under the agreement of sale and because the right to trial by jury exists in this state until a court determines by summary judgment or otherwise that there are payments which

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are due.

My client's position is that he has no obligation barring a decision by a jury that conditions precedent have been met for his payments.

But my first problem is that there is no statement in the order as to what is to be due. Indeed, the amount is in dispute as to the nature of the obligation because the agent for Mr. Lane in his deposition under oath specified that there was an agreement for a 12 and a half percent discount. So we need to know the exact order.

My second point to the court court was that my client will not deposit funds unless an interest rate commensurate with such deposit is specified in the order. This seems like a simple request to make. Even that, Mr. Gibson was not agreeable to, because assuming this amount is in the nature of one million dollars —

THE COURT: Did you make the request at the hearing?

MR. DUBIN: Your Honor, I made several requests at the hearing?

THE COURT: Did you make that request at the hearing?

MR. DUBIN: I would assume that I did, Your Honor.

THE COURT: I don't want assumptions, did you

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or didn't you?

MR. DUBIN: I would have to say that I did. I made a number of requests at the hearing.

Not only that, but this order has just been filed and it is the intention of the plaintiffs to bring, and it is our appropriate right to do, to bring a petition for rehearing before Judge Chun on these very matters.

Also the draft does not provide a reasonable time for deposit of such funds. My clients have explained that it would take 90 days to get money transferred because of restrictions in the Austrialian government for the transfer of such large funds outside of Australia.

THE COURT: Did you know that at the time of the hearing?

MR. DUBIN: I did not know that at the time of the hearing, Your Honor.

THE COURT: When did you find this out?

MR. DUBIN: I found that out when the order came down, and I wrote Judge Chun, I think it is in my letter of the 12th. If it isn't, it is in one of the subsequent letters. I found this out from my clients subsequently.

THE COURT: All right.

MR. DUBIN: And that would be one of the basis for a reconsideration. We frankly don't think 90 days is —

you see, we had Judge Sodetani who said the money didn't have to be put in the court, which we think was the law of the case, and then suddenly this order came down as a suprise to us, and we are perfectly happy to to take up on appeal whether a million dollars has to be deposited in this court on one days notice after the order is signed.

My clients are prepared to submit to examiniation by this court that they are making — that they would make reasonable efforts to provide this money, but the notion of forthwith is not clear, and our position is, Your Honor, that when a matter of enforcement of an order of this court is made, it should be brought back to the Judge who created the order, and " forthwith" has many interpretations and we think 90 days under these conditions is forthwith.

The next point I made is that if parties are supposed to submit disputed payments into court, then the equal protection of the law is required that all parties submit such payment, and that would be a matter also to go

before Judge Chun.
THE COURT: That motion was never raised to the Court.
MR. DUBIN: That is correct, Your Honor, that motion was never raised.
THE COURT: so that issue was never before

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court.
MR. DUBIN: The next point is that the Court's order is required to state findings of fact, and no findings have been provided in the draft of the order.
My understanding of federal constitutional law is that a state attachment process can not issue unless there is a finding of fact concerning the likelihood of success, and no such finding of fact has been made.
In fact, there was no evidentiary hearing. Now, I can not understand otherwise than this order is an attachment order for the very fact that the only statute cited by Mr. Gibson was that for estate holder, which is not applicable.
I have seen no authority for this order whatsoever. This is an order to provide security and both state law and federal law of a constitutional foundation decided by the United States Supreme Court in the last decade require findings of fact, and we are going to ask Judge Chun for an evidentiary hearing upon a reconsideration.
Also, we are going to ask Judge Chun that it would be appropriate and the attachment statutes of this state so provide for the posting of a bond. When one party is asked to put a million dollars into court, we would like some protection before putting the money in, so if this

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turns out to be a frivolous demand that we have appropriate protections, and we think the law on that is clear.
Also we pointed out this could be taken care of at some other time, and that this information should be kept from the jury that such deposit was made.

THE COURT: Mr. Dubin, why didn't you ask Judge Chun at the earlier hearing if you wanted to post a bond instead of cash?

MR. DUBIN: We are talking aobut a bond for the other side, Your Honor, our position —

THE COURT: Why didn't you ever raise the issue before Judge Chun?

MR. DUBIN: We raised a number of issues.

THE COURT: I get the impression this is the first time these issues have been raised.

MR. DUBIN: Your Honor, I can tell you it is in my motion papers. I raised the attachment issue and bond issue in my motion papers.

The matter was brought before the court before, when it was denied by Judge Sodetani. The Court will find in my brief two years ago, and also in the information I submitted to Judge Chun which incorporated in that brief the points that I am making today.

Now, I invite the Court to look at the record. Now, Mr. Gibson has made a number of evidentia.y statements here which are factually incorrect. Page 40

If the Court is going to rely upon his factual statements, then I would suggest to the court an evidentiary hearing is necessary.

All can I tell the Court is that I received this order yesterday before this motion to dismiss was filed, and that my clients would need a opportunity to apppropriately respond.

We intend to go and apply for a rehearing with Judge Chun to see if we can't make the order more specific and fair.

We are going to ask for 90 days to make this deposit, and I think that a motion to dismiss this case based upon this motion being filed the day before I have even received a copy of the order is grossly unfair.

If Mr. Gibson wishes to bring a motion in order to force the enforcement of this, that is fine, but to ask for a dismissal when I just received it, I feel is a —

would be a gross violation of my clients constitutional rights.

THE COURT: If your client had made payments to Mr. Gibson's clients according to the schedule, how much more would your clients have had to pay Mr. Gibson's client, under the agreement of sale?

MR. DUBIN: Our position is, Your Honor, that

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our clients have no obligation to make any payment under the agreement of sale because their performance has been excused because of fraud and breach of contract, of which we have evidence to present to the jury.

THE COURT: My question is if they had continued to make the payments.

MR. DUBIN: In January of 1982 there was an agreement to discount an $850,000 obligation by 12 and a half percent. So it would be $850,000 discounted by 12 and a half percent.

MR. GIBSON: The answer to your question is $966,133.80. It represents a payment of$850,000, which was due on January 13, 1983 under the terms of the agreement of sale, and monthly installments of $11,613 for a 10 month period from February 1982 until December 1982.

These are the payments which were required under the agreement of sale which were not made. The agreement of sale is very specific. My motion is very specific on this, there is no question as to what was due and unpaid.

This issue of the discount, this issue of the offsets all could have been or were raised in the motion with Judge Chun, Your Honor.

THE COURT: Mr. Dubin, so if you talk about a 12 percent discount you are talking about a discount of

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$102,000; is that correct?

MR. DUBIN: I would accept the Judge's math.

THE COURT: You had better not accept it.

MR. DUBIN: I don't have my calculator here.

It would be $850,000 minus 12 and a half percent.
THE COURT: All right.
MR. DUBIN: In addition to that there is a foreclosure on the property itself which is proceeding and that foreclosure would reduce that amount, Your Honor, that Your Honor is figuring out, by about $400,000 because the bank is going after the security and therefore the monies would not be due under the agreement of sale. So I suggest to Your Honor —
THE COURT: 12 and a half percent of $850,000 would be $106,250.
MR. DUBIN: Then, Your Honor, minus approximately $450,000 for a bank which is foreclosing. My client can't be expected to put up money when the bank is going after the security. That would be the placing of a double security.
THE COURT: Anything else?
MR. DUBIN: Well, the bank has decided to go after the property as a security. This includes the amount that was to be paid by the bank, and the bank has elected to go after the security in foreclosure.

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So our position is that the amount would have to be further reduced by the amount owing to the bank, otherwise there would be a double payment.
THE COURT: Well, if your client pays to the bank.
MR. DUBIN: But the bank has elected to go after the security and they are selling the property.
THE COURT: Anything else?
MR. DUBIN: No, Your Honor.
THE COURT: Mr. Gibson?
MR. GIBSON: Just very briefly, Your Honor, with respect to the issue of whether or not this is the same order which was submitted, Your Honor, it is the same order that was submitted.
THE COURT: the record will speak for itself.
MR. GIBSON: I think I pointed out what the

figures are, with respect to Mr. Dubin's argument just now, all of these arguments which he has made this morning either were or could have been made at the time of the motion before Judge Chun.

THE COURT: All right.

MR. DUBIN: Your Honor, it is not ususual to ask a court for reconsideration based upon certain facts, and sometimes those matters are given. It is provided for in the rules, and my clients feels that he should have the

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opportunity to do so.

THE COURT: All right. Miss Lee, anything else that you would like to add?

MISS LEE: No, Your Honor.

THE COURT: Or Mr. Ichida, since you are here?

MR. ICHIDA: No, Your Honor, thank you.

THE COURT: Apparently, there is some dispute as to the amount that you are talking about to be deposited with the Court and in order to resolve that difference what the court is going to do is I am going to take Mr. Dubin's word that $850,000 was the amount we are talking about, discount that by 12 and a half percent, which leaves a balance of $734,750, and I am going to amend the order, Judge Chun's previous order, to say that $743,750 shall shall deposited with the Court by 8:30 — excuse me, we go to trial at 9:30. By 9:30 Monday morning. That is this coming —

MR. DUBIN: Your Honor, if I can speed things along, I can tell you that the money cannot be deposited by that time, and our position it that that would be a grossly unfair burden upon the plaintiffs, and can tell the Court frankly that this money cannot be deposited and I wish the Court to understand that that this is not a case where my clients can even take the property and use that as collateral because of damage that was caused by defendant

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Lane.

This puts my clients in a very hardship

situation, and I can tell you that there is no way that that money can be gotten from Australia because of the Deak Perrera, and I assume Mr. Gibson — we provided you — also has the information on Deak Perrera's bankruptcy —

THE COURT: What can your clients post with the Court?

MR. DUBIN: I would have to talk with them, Your Honor.

THE COURT: All right. What the Court will do is say security or cash in the amount of$743,750.

MR. GIBSON: If that is not posted by 9:30 A.M. on Monday, Your Honor, what is the ruling of this Court?

THE COURT: We will cross that bridge when we come to it.

MR. DUBIN: Your Honor, I can tell you that it cannot be posted. I have talked to my client. They are in their 70's.

They have done their estate planning, and the cash they have is in Australia and they have already checked and found out the regulations of the Canberra Bank, and it is impossible to do that, there are other liquid funds which are gold and it is tied up in Deak Perrera's bankruptcy in the United States, but the money is in Hong

Kong, and it is tied up there, and there is a receiver there, and that money is under the control of the receiver.

MR. GIBSON: Your Honor, this —

THE COURT: The Court is going to order that the $743,750 or security of that value be posted with the Court by 9:30 Monday morning.

MR. DUBIN: 9:30 Monday?

THE COURT: Yes, that is the day of the trial.

MR. GIBSON: It is the 21st, Your Honor, January 21st.

THE COURT: All right. Anything else?

MR. GIBSON: Your Honor, lthis is not a matter which pertains to this motion, but we do have the order with respect to yesterday's motion. We were not able to

get it to Mr. Dubin.

I am handing it to him no. All other counsel have approved it as to form.

THE COURT: All right.

STATE OF HAWAII
CITY AND COUNTY OF HONOLULU

I, REGIS TAYLOR, Certified Shorthand Reporter 192, an Official Court Reporter for the First Circuit Court, State of Hawaii, hereby certify that the foregoing comprises a full, true and correct transcription of my stenographic notes taken in the above-entitled cause.

Dated this 1st day of January, 1985.

OFFICIAL COURT REPORTER
REGIS TAYLOR, RPR, CSR 192

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

LEON D. RICHARDSON, et al., *Plaintiffs,*
vs.
HOWARD T. LANE, et al., *Defendants.*

CIVIL NO. 70332

TRANSCRIPT OF PROCEEDINGS

had before the HONORABLE EDWIN Y. SASAKI, Assigned Judge, presiding, on Monday, January 21, 1985, in the above-entitled matter; MOTIONS IN LIMINE.

APPEARANCES:

GARY V. DUBIN, ESQ. — For the Plaintiffs
Attorney at law

MICHAEL W. GIBSON, ESQ. — For Defendant Howard Lane
LORRIN HIRANO, ESQ.
Attorneys at law

WESLEY ICHIDA, ESQ. — For Defendants Sinsabaugh
CATHY LEE, ESQ. and Waterfront Properties
Attorneys at law

REPORTED BY:
Jonell M. Kaku, C.S.R. No. 138
Official Court Reporter
First Circuit Court
State of Hawaii

MONDAY, JANUARY 21, 1985 8:40 A.M.

(the clerk called the case.)

MR. GIBSON: Good morning, your Honor. Michael Gibson and Lauren Hirano who are present in court today with Defendant Howard Lane and cross-claimant Willis Sinsabaugh. We're ready to proceed this morning.

MR. ICHIDA: Wes Ichida and Cathy Lee, together with Defendant Willis Sinsabaugh, individually, and as a representative of Waterfront Properties, defendants. We are also ready to proceed, your Honor.

MR. DUBIN: Good morning, your Honor. Gary Victor Dubin representing the plaintiffs in this case. Plaintiffs object to any further proceedings in this action at this time.

THE COURT: What's the basis of your objection?

MR. DUBIN: The filing of disqualification by Leon D. Richardson, disqualifying the The Honorable Edwin Y. Sasaki, pursuant to Section 601-7(b) of the Hawaii Revised Statutes filed this morning, January 21st, at 8:24 a.m.

THE COURT: Mr. Gibson, did you receive a copy of that affidavit?

MR. GIBSON: Your Honor, it was filed at 8:24 this morning, and I have received a copy of it. I briefly

reviewed it. To be quite honest, apparently, what the affidavit seems to say is that they don't want your Honor to try this case.

THE COURT: Mr. Ichida?

MR. ICHIDA: I just received it, your Honor. I haven't even read it.

THE COURT: Mr. Dubin, the Court has received a copy of your affidavit. However, being that your affidavit is not in the form of a motion, the Court will not consider it this morning. All right?

Mr. Gibson, you want to proceed with your

motion, please, first motion.
MR. DUBIN: Your Honor, may I point out to the Court that Section 601-7(b) requires a mere filing of the affidavit, says the judge is thereby disqualified from proceeding. Does not provide for a motion.
THE COURT: I will not disqualify myself. All right?

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MR. DUBIN: Your Honor, may I make a statement on the record, again, your Honor, that it is impossible for plaintiffs to proceed with their case because of the ruling of this Court concerning sanctions.
Although it is not yet 9:30, I can tell your Honor that my clients have not deposited $743,750, 9:30 this morning, with the clerk of the court, and my clients have instructed me not to participate in this trial because they feel this is a denial of their right to a jury trial and the right to a trial judge who has not been a party to this action and has made decisions which bring in knowledge which will be relevant to other issues in this matter which will come in at a time in the trial and will represent information secured outside the trial that would disqualify a juror if the juror had such knowledge. That's our

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understanding of the law and that's our position.
And if your Honor wishes, I will prepare a motion for disqualification.
THE COURT: Mr. Dubin, the Court is not trying any of the facts of this case. The facts were to be tried by the jury. In fact, if you will recall, in our pre-trial conference, special instructions were to be given to the jury on the facts, and based upon the finding of facts by the jury, then, the Court would make the proper decision. Therefore, the Court was not at all to try any of the facts in this particular case. So I think you are in error on that matter because it was agreed that special verdict forms would be given to the jury to determine the facts of the case.

MR. DUBIN: I believe, your Honor, that the materiality of the breach is a question for the judge and not for the jury. And we feel that would relate to the question as to whether a deposit in court would be necessary prior to the trial.

Also, there is the issue of specific performance of the contract which my clients assert which I believe is an issue for the trier of fact. I've had many discussions with Mr. Gibson about this, and we've agreed that there are questions here, there are questions that are non-jury questions for the trial judge. Mr. Gibson had so

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advised me.

THE COURT: Mr. Gibson?

MR. GIBSON: I agree with Mr. Dubin. This is exactly what your Honor correctly stated previous to Mr. Dubin's statement that we were going to talk about that at the pre-trial conference. We did talk about it at the pre-trial conference, and the agreement was as your Honor has just described so I have nothing further to add to it.

THE COURT: Mr. Ichida?

MR. ICHIDA: I have nothing further to add too. I agree with the Court's recollection.

THE COURT: Court will take a recess.

(Recess had.)

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THE COURT: Counsel, will you have your name for the record.

MR. GIBSON: Michael Gibson and Lorrin Hirano for Defendant Howard Lane and cross-defendants or cross-claimants Howard Lane and Willis Sinsabaugh.

MR. ICHIDA: Wes Ichida and Cathy Lee for Defendants Willis Sinsabaugh and Waterfront Properties, Inc.

MR. DUBIN: Gary Victor Dubin reprensenting all plaintiffs, Leon D. Richardson, Margie J. Richardson and Copthorne N.V., appearing consistent with the objections previously made.

THE COURT: All right. Madame Clerk, could you draw 12 names, please.

MR. DUBIN: Your Honor, could we have a bench conference?

THE COURT: All right.

(The following bench conference was held:)

MR. DUBIN: Your Honor, my clients will not waive their trial by jury but have instructed me not to participate in this proceeding because we believe they're being deprived their constitutional right to trial by jury and to a trial judge who is impartial, based upon the memoranda which have been filed in this court today.

On that basis, my clients have instructed me

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not to participate, and we shall be taking an appeal from this proceeding. Again, I would ask the Court to permit us an interlocutory appeal.

THE COURT: All right. One thing at a time. All right, first of all, impartial judge. In what way am I impartial? I'm not impartial.

MR. DUBIN: There are —

THE COURT: Your affidavit doesn't specify.

MR. DUBIN: It's not my affidavit, your Honor. It's my client's affidavit, according to the statute, and it is on the basis that some of the issues in this case are to be determined by the trial judge such as recision, materiality of the breach such as specific performance of the contract, and we should have a trial judge who has not made substantive determinations in the case which are equivilent to the types of decisions that will probably have to be made at the trial.

THE COURT: All right. Mr. Dubin, at the pre-trial conference this past Friday, it was agreed that all facts would be tried by the jury and a special verdict would be entered —

MR. DUBIN: Still, your Honor —

THE COURT: — according to the finding of facts. And only after that would the Court make its

decision after the jury made its finding of fact. The

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judge would then apply the law to those facts.

MR. DUBIN: Your Honor, that is not our understanding of the law because the issue, for example, in —

THE COURT: That's what we agreed to in the pre-trial conference, Mr. Dubin.

MR. DUBIN: I believe we agreed that there would be a special verdict as to facts relative to the recision issue. However, there are decisions that the trial judge must make as to recision concerning the materiality of the breach, for example, which is a question of law

There are other issues in this case concerning specific performance of the agreement of sale which would be questions which we believe would be decided by the trial judge and not by a special verdict of the jury. We believe that would also be the case on the issue of defamation. We believe that that would also be the case on the issue of the statutory causes of action concerning fraudulent trade practices.

I can re present to this Court that I've talked over this subject with Mr. Gibson, and we have agreed from day one, which was when I came into this case two years ago, that there are some issues here that are within the province of the trial judge, and there are some issues that

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are of a jury nature, notwithstanding your Honor's correct memory of our discussion concerning special verdicts as to finding of recision.

We feel it is most unfortunate that these two motions to dismiss were presented to your Honor, and we feel that this is a structural bias that your Honor has unfortunately been placed in this position, and my clients do not feel that they would have a fair, impartial trial. This Court should take into account, in addition to the niceties of the legal issues here, I believe, the feelings

of my clients, a desiring to have an impartial trial judge.

THE COURT: Mr. Gibson?

MR. GIBSON: Your Honor, whatever Mr. Dubin and I may have agreed on before the pre-trial conference I think is first of all, I'm not sure that he's correct in what he says, what he discussed. But the point of the issue here is that it was agreed by all the parties and this Court that all issues of fact would be decided by the jury.

I would further point out that this motion was filed at 8:24 this morning with the jury trial to have commenced at 9:30, and whether there is merit or lack of merit to that affidavit, I would suggest to the Court that it was untimely as well as unfounded.

THE COURT: Mr. Ichida?

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MR. ICHIDA: Yes, your Honor. I think in response to Mr. Dubin's arguments, for one, the Court's decision with respect to the use of the experts is merely an evidentiary ruling. It is not a substantive ruling and therefore, does not reflect any biases of the Court one way or another.

I think it's incumbent upon the plaintiffs at this time to go forward with their case with or without those experts. Much of the case is still totally intact, especially the case vis-a-vis Defendants Sinsabaugh and Waterfront Properties, Inc. where he still has his expert. He still has a claim for recision. He still has his claim for general damages.

If the plaintiff does not go forward, we will take the position that his claims against Sinsabaugh and Waterfront Properties must be dismissed on the merits.

MR. DUBIN: Concerning the issue of timeliness, your Honor, this matter just came —

THE COURT: Just a moment. Mr. Dubin, the Court's going to not disqualify itself, all right? I'm not going to disqulify myself because I do not believe that the Court is impartial — The Court is impartial, rather,

to this whole matter because all issues of fact are to be tried by the jury, and the Court won't try any issues of fact.

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The second request as far as interlocutory appeal is concerned, Mr. Dubin, the orders have not been approved by you. According to the rules, you have a right to submit the oral order in five days. Therefore, the Court cannot take that right away from you. Therefore, the Court has not signed the order. Therefore, your request or your motion to shorten time and your motion for interlocutory appeal is improper.

MR. DUBIN: Your Honor, Rule 23 of the Circuit Court Rules specifies that upon being served with the order drafted by the prevailing party, the other party, which would be the party I represent, has five days within which to submit either objections or an order, according to the language of Rule 23.

Your Honor, my clients, parties-plaintiffs in this action, have submitted to this Court their objections, and I filed those objections this morning. There is nothing further to be done. We waive all time requirements. We will not change our mind. It is, we consider, urgent because of the fact that this trail is now scheduled to proceed, and we would appreciate a ruling.

THE COURT: All right. The matter of interlocutory appeal is not before the Court yet at this time. Therefore, the Court won't even consider it. All right? It's just an oral motion that you're making right

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now.

MR. DUBIN: It has been presented. Your Honor has our objections.

THE COURT: The Court has not signed your request to shorten time. The Court has not approved your request to shorten time for hearing the motion.

Anything else?

MR. DUBIN: The deposit has not been made at

9:30 as your Honor —
THE COURT: Right, but the Court hasn't signed that order yet so there's nothing to enforce at this time.
MR. DUBIN: The Court has made the ruling.
THE COURT: But the Court has not signed the order.
MR. DUBIN: The Court has made the ruling. Does the Court wish to reconsider its ruling?
MR. GIBSON: I would also like to point out on the record when I specifically asked what sanctions the Court would impose if the money was not put up, the Court said that matter would be decided if and when the money was not put up, and that matter is not before the Court at this time.
THE COURT: Very well. The order hasn't been signed yet because he's objecting to the order, all right? Anything else, Mr. Dubin?

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MR. DUBIN: Your Honor, we have been told by your Honor that we would not be permitted to introduce three of our experts at the trial of this action. We are here today, and your Honor has not signed the order but your Honor has not withdrawn the ruling. We object to the impaneling of this jury under the circumstances because we believe that it violates the substance of my clients' right to trial by jury.
THE COURT: All right. Your objection is noted. We'll proceed with the trial.
MR. DUBIN: On that basis, I will say that we do not waive our right to trial by jury.
THE COURT: The jury panel is sitting right there.
MR. DUBIN: I'm instructed not to participate in these proceedings.
THE COURT: The panel is sitting right there, Mr. Dubin, and what you have been instructed to do, I don't know. We will proceed with calling of the 12.
MR. DUBIN: I'm telling the Court that it is my

legal opinion that I cannot participate in this proceeding and still protect the rights of my clients. I would ask the Court, under these circumstances, to grant a continuance of one day so that I could at least have the opportunity to present a legal memorandum to the Court

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showing that the legal issues in this case, the trial judge does make decisions.

THE COURT: Mr. Dubin, you knew from last week what was going to happen today. You've had all weekend to work on it. I don't see where one more day would help. We'll proceed.

MR. DUBIN: I did not know as of Thursday morning, your Honor, that these things would happen, and that's two court days prior to today.

(End of bench conference.)

(Mr. Dubin left the courtroom.)

THE COURT: Mr. Dubin just left. Did he inform you, Mr. Bailiff, as to why he was leaving?

THE BAILIFF: Right now? No, he didn't tell me.

THE COURT: Did he inform any of the other attorneys as to why he was leaving?

MR. ICHIDA: I think Mr. Dubin is taking the position that it will prejudice his position if he participates in the proceedings in any way.

THE COURT: All right. Because of the fact that the plaintiff's attorney has left, the Court's going to enter a default. The Court is going to dismiss the plaintiff's action against the defendants with prejudice. As far as the counterclaim is concerned, the Court's going

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to enter a default, and Mr. Gibson, you may proceed with the proof this morning if you wish. As far as the cross-claim is concerned, the Court's going to dismiss the cross-claim because of the fact that the Complaint has been dismissed. All right?

MR. GIBSON: Thank you, your Honor. We are

ready to proceed.
THE COURT: The Court will, because of the fact that this has now turned into a proof hearing, the Court will excuse the jurors. Thank you for coming, and please report back to the jury pool.
(The prospective jurors were excused.)
THE COURT: For the record, I'd like the record to note that immediately after the bench conference, Mr. Dubin left the courtroom without sayng anything to anyone.
MR. ICHIDA: Excuse me Judge, just to clarify one thing, the Complaint was dismissed for failure — was dismissed?
THE COURT: Failure of prosecution because Mr. Dubin left.
MR. ICHIDA: And the Court is dismissing it on its merits?
THE COURT: Yes.
MR. ICHIDA: Thank you.

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THE COURT: All right, shall we take a short recess? I'd like a conference with Mr. Gibson and Mr. Ichida before we proceed with the proof.
(Recess had.)
THE COURT: Note the presence of Mr. Ichida and Mr. Gibson.
MR. ICHIDA: Excuse me your Honor, in view of the proceedings this morning and the chambers conference and that I gather Mr. Gibson will be proceeding with the counterclaim and the agreement of sale, may we be excused from attending or would you prefer that we remain?
THE COURT: Mr. Gibson?
MR. GIBSON: Either way, your Honor. I have no — As I understand —
THE COURT: The only thing we're proceeding on is your conterclaim.
MR. GIBSON: That's right, and I have no problem with Mr. Ichida being excused in this matter.

THE COURT: You're excused, Mr. Ichida.
MR. ICHIDA: Thank you.
(Mr. Ichida and Ms. Lee left the courtroom.)
MR. GIBSON: Your Honor, we would like to call as our first witness, Mr. Howard T. Lane.

HOWARD LANE

a defendant herein, called to testify on his own behalf,

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having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GIBSON:

Q Mr. Lane, could you please state your full and correct name.
A Howard Thomas Lane, now Senior.
Q What is your present residence address?
A 1600 Ala Moana, Suite 3300, Honolulu.
Q Are you a party to the matter of Leon D. Richardson, et. al., vs. Howard T. Lane, et. al.?
A Yes, sir. I'm the defendant.
Q Mr. Leon D. Richardson and his wife, Margie Richardson, are known to you to be citizens of Australia and residents of Hong Kong; is that correct?
A That's what they've told me.
Q The plaintiff, Copthorne N. V., is known to you to be a Netherland Antilles corporation; is that correct?
A That is correct.
Q On or about June 30, 1981, did you have occasion to enter into an agreement of sale with the Richarsons with respect to the premises at 10 Poipu Place?
A Yes, sir.
Q Mr. Lane, I'm handing you what has been marked as Exhibit A for identification and ask you if you can

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identify that document.
A Yes.
Q What is that document, sir?
A It's an agreement of sale.

Q Is that a recorded ocpy of the Agreement of Sale which is referred to in the Counterclaim?
A Yes.
Q You were the owner at that time of a leasehold interest in the premises at 10 Poipu Place?
A Yes, sir.
Q With respect to that Agreement of Sale, was the $500,000 down payment provided for in that Agreement of Sale paid to you?
A Yes, it was.
Q How many monthly installments were received by you
A He's delinquent. He paid up till February 11th of 1982, and he's been delinquent ever since. His interest is paid till February 11th, 1982.
Q So what you're saying is after February 11th, no further payments were made; is that correct?
A What really happened, he paid in February and — in late February or early March and that paid till February 11th.
Q So the March payment was not made. The

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February payment was made.
A That's right.
Q When that payment was not made, did you have occasion to request that a notice of default be sent to Copthorne and the Richardsons?
A Yes.
Mr. GIBSON: Your Honor, I request at this time that Exhibit A be received into evidence.
THE COURT: All right.

(Defendants' Exhibit A was received in evidence.)

Q (By Mr. Gibson) Mr. Lane, I'm handing what has been marked as Exhibit B for identification. Do you recognize those documents?
A Yes.
Q Were those documents sent pursuant to your

request?
A Yes.
Q Are those the notices of default which you previously referred to?
A Yes, sir.
Q Have you been able to calculate the amount of money which is owed to you under the terms of the Agreement of Sale at the present time?
A Yes. I believe I gave you the — we worked out

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the schedule the other day.
Q Can you provide the Court with a breakdown of those amounts, sir.
A Mike, you have the calculations.
Q You did prepare a schedule?
A Yes, sir.
MR. GIBSON: Your Honor, I'd request that Exhibit B be received into evidence at this time.
THE COURT: All right, Exhibit B will be admitted into evidence.

(Defendants' Exhibit B was received in evidence.)

Q (By Mr. Gibson) Handing you Exhibit C, Mr. Lane, is that the schedule which you previously referred to?
A Yes, sir.
Q Using that schedule, can you explain to the Court the amount of moneys that are presently due and owing under the Agreement of Sale.
A 1,253,113.82.
Q Explain to the Court how you came to that figure.
A Okay. There's interest, delinquent interest, from February 1st of '82 to January 13, 1983, equals $121,770.96. The property expense which is like the

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impound account was $4,599.46 that was due as of February 13th. The balloon payment was due February 13th in the

amount of $850,000, a total at that point, $976,370.42. That disregards late fees at 12 per cent and so forth based upon the Agreement of Sale.

Under Schedule B of this account — of this schedule, he's delinquent from January 13, 1983 through 1/13/84 of $132,040.80, and then he's delinquent again from January 13th, 1983 to January — pardon me, from 1/13/84 to 1/13/85, an additional $132,040.80, plus the property tax for the two years which is the impound account — is $5,485.86 or an additional $272,053.32.

If you take the two figures and put them together into what we call Schedule C, it amounts to 1,253,113.62 which is what he's presently delnquent.

Q Mr. Lane, have you had occasion to view the premises within the last year?

A No, sir.

Q Do you have some basis for a belief that it may be necessary to make certain repairs to the premises?

A Yes, sir.

Q What is that basis?

A The last deposition that I attended — I attended approximately three or four depositions at the property, and at the last deposition that I attended was in

1982. I believe, from memory, it was around January, February. Anyway, Mr. Richardson's deposition, whatever date that was. And at that time —

Q Mr. Lane, the lawsuit was filed in March of 1982.

A Oh, I'm sorry. I got my years screwed up. Let's see. '83 — two years ago. So that would be '83. It's two years ago or roughly that I saw the property last so it would be 1983, the early part of 1983.

Q What I'm trying to get at, maybe you could just explain it to the Judge, what it's going to fix the house up.

Q At this particular point, I don't think a real estate broker would sell the property unless the

allegations —

Q Just explain it to the Judge, Mr. Lane, how much it's going to take, in your opinion, to fix up the house.

THE COURT: Mr. Gibson, he hasn't seen the house for two years.

MR. GIBSON: I understand, but I think he can — if he works on it — explain why he thinks it's going to cost what he thinks it's going to cost.

THE WITNESS: Well, I think it's going to cost approximately $50,000 which means painting and putting the

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house back together because they've torn it up quite a bit. We're going to have to fix all the sliding doors and probably going to have to put in additional waterproofing because those were the allegations.

Q (By Mr. Gibson) Okay, you haven't been there for two years?

A Right.

Q How is it that you think that that's going to have to be the case?, Do you have any basis for that, Mr. Lane? That's my point.

A They're all run-down. All the screens are torn and worn out at the time I was out there.

Q What I'm saying is how do you know what it's like today? How do you know what it's been like for the last two years. Have you been reading transcripts of testimony?

A I've read some information that they've done a lot of tearing up of the house since the time that I've been to the house last.

Q So you believe, based on the testimony that you've read and your observations about two years ago, that it's going to take at least $50,000 to fix it up; is that correct?

A That's my opinion.

Q Have you incurred any expenses or do you expect

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to incur any expenses in the way of charges from the Bank of Hawaii?

A Yes, sir.

Q Could you give the Court an estimate of what those expenses are.

A I have a letter from the Bank of Hawaii dated January 2nd, 1985. I'd ask them to give me a recap of where they're at. It's relative to No. 0210-6. When I started, my principal at the bank was $348,754.08.

Q Excuse me, Mr. Lane. The question was what are the charges that you're going to incur from the Bank of Hawaii, attorney's fees?

A Well, I have attorney's fees. In the mortgage, it says I'll have to pay it. We have escrow advances of 3,579.29. That's 3,000. We have general ledger advances of 5,649.96, late charges of 4,368.16 and interest that I haven't paid so far to the bank. Am I suppose to include that or not?

Q No. What's the total that you expect to be charged the Bank of Hawaii, Mr. Lane, in addition to the interest that you owe?

A Probably about $20,000.

Q The Agreement of Sale provides for late fees of 12 percent; isnt' that correct?

A That is correct.

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Q And the $850,000 which was due has not been paid; isn't that correct?

A That's correct.

Q And have you calculated what the late fees on that $850,000 is at 12 percent per annum?

A I think you — Let me see if it's on this schedule.

Q When was it due?

A It was due in January 13, 1983.

Q So approximately two years ago?

A That's 12 percent per annum.

Q You say the monthly installments that were due but have not been paid amount to how much?
A Hundred and thirty-two — Well, I'll — there's three different series of figures, Mr. —
Q We're trying to make it simple.
A Okay.
THE COURT: You want a recess?
MR. GIBSON: No, your Honor. I'm almost finished.
Q Could you tell the Judge what the installments that were due that had not been paid were.
A From January 13 — I mean February 1 of '82 through January 13, '83 is 121,770.
Q Okay.

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A Okay. Then —
Q You've previously testified to the other numbers. Is it your understanding that the Agreement of Sale was assigned Copthorne N.V. and then reassigned from Copthorne back to the Richardsons?
A That's my understanding. I dont think it's been recorded, though.
MR. GIBSON: Your Honor, at this time, I'd request that Exhibit C be received into evidence.
THE COURT: All right.
(Defendants' Exhibit C was received in evidence.)
MR. GIBSON: Your Honor, I believe Exhibit B has also been received into evidence.
THE COURT: Yes.
Q (By Mr. Gibson) Handing you Exhibit D, what is Exhibit D, as far as you know?
A It's an assignment of agreement of sale form Copthorne back to the Richardsons dated 14, June of '83
Q You consented to the assignment of the agreement of sale from the Richardsons to Copthorne, did you not?
A Yes, I did.

Q Under that assignment, you preserved your rights against the Richardsons; isn't that correct?

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A That's correct. They personally guaranteed it.
Q You did not consent to the reassignment from Copthorne back to the Richardsons; is that correct?
A That's correct.
Q Have you incurred or do you expect to incur attoryney's fees in your defense of this case?
A Yeah. I have and I expect to have additional.
Q Could you give the Court an approxmate figure as to the amount of attorney's fees which have been billed to you in this case.
A At least $105,000.
Q That was as of what date?
A That was as of — I think it was last Friday.
Q In other words, the bill for December?
A Yes, sir.

MR. GIBSON: Your Honor, I'd request that Exhibit D be received into evidence.

THE COURT: All right. It's admitted into evidence.

(Defendants' Exhibit D was received in evidence.)

MR. GIBSON: Your Honor, I would call as my next witness —

THE COURT: You may step down, sir.

MR. GIBSON: — Mr. Willis Sinsabaugh.

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WILLIS SINSABAUGH,

a defendant herein, called to testify on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GIBSON:

Q Sir, could you please state your full name.
A My name is Willis Floyd Sinsabaugh.
Q What is your present residence address,

Mr. Sinsabaugh?
A 105 Popu Drive.
Q You are also a defendant in this case, are you not?
A I am.
Q Did you have occasion to assist Mr. Lane in the sale of the premises at 10 Poipu Place which is reflected in the Agreement of Sale, Exhibit A, to this proof hearing?
A I did.
Q In what capacity did you assist Mr. Lane?
A I was Mr. Lane's agent and broker.
Q Prior to assisting Mr. Lane in that regard, have you had occasion to be familiar with the premises at 10 Poipu Place?
A We listed the premises prior to Mr. Lane. We sold it to Mr. Lane.

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Q At the time you sold it to the Richardsons for Mr. Lane, what was the sale's price?
A 1 million — The sale's price was $1,450,000. Richardson paid 135 —.
Q Do you have an opinion today as to what the house is worth today, what the actual market value would be today?
A The market value of the house today, once it's refurbished to its original fine condition, would be somewheres around 1.2 million to 1.3 million. There are two other houses for sale.
Q I'm not asking you what it would be worth if it were restored. I'm asking you what it's worth today.
A Today? In its present condition?
Q Today.
A With the damages they're in?
Q Exactly as you know it to exist today.
A Less than a million dollars.
Q Approximately what amount, sir?
A Around 900 —.
Q Are you familiar with the value of real estate

in that area?
Q Yes, sir.
A And how is it that you familiar with the value of real estate in that area?

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A I've sold several houses in the area. I live in the area.
Q Do you specialize in any particular type of property?
A Primarily waterfront properties.
Q Is this a waterfront property?
A This is a waterfront property.
Q So your estimate as to the present market value is approximately $900,000?
A As I know the house today.
Q Today, that's correct. did you have occasion to receive a telex from Mr. Leon Richardson?
THE COURT: Mr. Gibson before you get on this subject, I don't know when he saw it last or how he comes about this knowledge.
MR. GIBSON: Very well.
Q Can you explain to the Court your basis for your belief that it's presently worth today approximately $900,000?
A I have not pysically been in the house for two years or approximately. The last time I was there, it was very deteriorated so to —
THE COURT: do you know what the condition of the house is today?
THE WITNESS: I have not been in the house for

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two years so the answer would be no.
THE COURT: Then, how can you say how much it's worth today?
THE WITNESS: I am assuming, assumption, that we have $50,000 for repairs, and if it was repaired and it was in its original —
THE COURT: This is an assumption on your part?

THE WITNESS: Yes.
THE COURT: Court's not interested in —
THE WITNESS: Assumptions?
THE COURT: — assumptions, that's right.
Q (By Mr. Gibson) Have you read the reports of various experts that have been retained by plaintiffs in this case?
A I have.
Q What do those reports reflect as to the condition of the house?
A It has considerable refurbishing to do and corrections, and without an assumption, the house is worth — if it was in reasonable condition, it's worth over a million dollars.
Q Is it worth, assuming that it's fixed up, in your opinion more than it sold for when it was sold to the Richardsons?
A No.

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Q Is it worth less than —
A It's worth approximately the same as.
Q Assuming that it were to be fixed up?
A Yes.
MR. GIBSON: Your Honor, may I proceed now into the area of the telex?
THE COURT: Sure.
Q (By Mr. Gibson) excuse me, if that house were to be sold today, Mr. Sinsabaugh, what would the commission be on the sale?
A It would be six percent of the gross.
Q And would there be other costs which the seller would have to pay in addition to the commission?
A The other costs would be his portion of the closing costs, the termite inspection or anything else that was put in the offer at the time of the sale.
Q What would the magnitude of a sale that we were talking about in this type of home, what kind of dollars are we talking about in addition to the commission?

A Approximately $2,000.
Q Handing you Exhibit E for identification, Mr. Sinsabaugh. Are you familiar with that document?
A Yes, I am.
Q How is it that you're familiar with that document, sir?

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A This document was received by me through my telex in my office.
Q Do you have any reason to believe that the allegations contained in that telex with respect to the activities of either you or Mr. Lane are true?
A No.
Q They are not true?
A They're not true.
MR. GIBSON: Your Honor, I have nothing of this witness and request that Exhibit E be received into evidence.
THE COURT: All right. Exhibit E will be received into evidence.
(Defendants' Exhibit E was received in evidence
MR. GIBSON: Your Honor, I have no further witnesses. I would like to briefly address the issue of the Agreement of Sale and the request that we are asking for.
THE COURT: All right
MR. GIBSON: Your Honor, we are asking in our Complaint that the Agreement of Sale be cancelled, that Mr. Lane be permitted to retain the funds held, that we be entitled to a writ of possession and that we be awarded attorney's fees and costs.

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Under the cases of Jenkins vs. Wise, Gomez vs. Pagaduan and Ventura vs. Grace, the Court has set forth the criterion under which the relief which I have just requested can be granted, and the Court has specified that in the situation where the liquidated damages are being

requested to be retained, the actual damages must be the same as or close to the liquidated damages.

The criterion that the court has used is as follows. Number one, "the excess of the contract price over fair market value at the time of the termination." The testimony is that at the very best, the property is not worth any more today than it was at the time it was sold, and that is the contract price. In fact, from the evidence, it is probably worth less and anywheres from $50,000 to possibly $400,000 less.

The second item to be used in computing or calculating the actual damages is interest due during the purchaser's equitable ownership. Mr. Lane has testified that the interest which is due is $127,000 — excuse me, $121,000. Those are the installments which were not paid but were due. The actual or estimated cost of resale of the property on the termination date, that being six percent of the property, assuming that it were worth 1.3 million dollars which we don't think it is, that would be approximately $80,000, your Honor.

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Any payment other than principal and interest required under the Agreement of Sale which the purchaser failed to make, Mr. Lane has testified that the taxes and other expenses amounted to approximately $4,500.

The late fees of 12 percent of any amounts unpaid would approximate $204,000. Actually, in access of that.

And any expenses or damages which the seller is entitled to recover under the purchaser's breach, this would include attorney's fees which I can relate to the Court are far in excess of $105,000, costs and expenses incurred which the Bank of Hawaii will assess which Mr. Lane has testified to.

Your Honor, I would submit that all of this infers that the buyer acted in good faith, and I think it would be advisable on my part if your Honor would be willing to do so, to let me put on Mr. Lane to point out

one other thing, and that is that the buyer in this case did act in bad faith. But I think rather than argue it before I have the evidence, may I reopen to put on —

THE COURT: All right.

MR. GIBSON: Mr. Lane, could you take the stand, please.

THE COURT: I don't think you covered Exhibit E with Mr. Lane.

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MR. GIBSON: Pardon me, your Honor?

THE COURT: I don't think you covered Exhibit E with Mr. Lane.

MR. GIBSON: You're right, you Honor.

HOWARD LANE,

resumed the stand ant testified further as follows:

DIRECT EXAMINATION (Resumed)

BY MR. GIBSON:

Q Mr. Lane, did you have occasion to be adivsed of the telex which was received?

A Yes.

Q Did that cause you any damages, actual, out of pocket dollars and cents?

A The whole scenario —

Q No. Just answer that question.

A No.

Q How did the telex affect you?

A Telex affected me in my whole complete lifestyle. The whole scenario is steps took place. It's not just the telex in itself. It's the — all the circumstances.

Q Can you explain what you mean by that.

A Well, there was a series of letters the man wrote. He wrote to the bank. He wrote to Mr. Sinsabaugh very derogatory letters. I was involved in a very large

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trial with my ex-wife, and I had an opportunity to — The case ran way over on the part of the plaintiff, and me as a defendant, unfortunately, I had two and a half days from a

six-week trial or they would have had a mistrial, but because I didn't have the income comng in, I couldn't afford to keep feeding that particular trial so I took a mistrial — I took a verdict, a jury verdict, and lost, and then since then, I've had to file Chapter 11 and protect the rest of my assets.

Q I'm handing you Exhibit — Did you have occasion to receive a letter dated February 8th from Mr. Richardson?

A I remember that letter.

Q In that letter, did Mr. Richardson indicate to you that he was going to fix up the house?

A Yes, sir.

Q Did Mr. Richardson in that letter indicate to you that the funds which were due under the Agreement of Sale would be put into a trust account for distribution upon the determination of who was obligated to make those repairs)

A That's correct.

Q Did Mr. Richardson make the repairs to the house?

A No, sir.

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Q Did Mr. Richardson or Copthorne put the money into the escrow account which they said they would do, so far as you know?

A I'm told they did.

Q Did you know whether they eventually withdrew those funds?

A Yes, they did.

Q And today, as far as you know, are those funds on deposit either in the court or in some bank in the State of Hawaii?

A No place we could put our hands on.

MR. GIBSON: Thank you. Your Honor, I'd request that the last exhibit be received into evidence.

THE COURT: All right.

(Defendant's Exhibit F was received in evidence.)

MR. GIBSON: I have no further questions of this witness, your Honor.

THE COURT: You may step down.

MR. GIBSON: Your Honor, what I believe we have established with respect to this proof hearing is that the actual damages, this does not include at all the principal of $850,000 which was not paid, but that the actual damages, the moneys that are due or the moneys that Mr. Lane will have to incur as a result of fixing the

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premises up, reselling it, and defending himself in this action and incurring the additional cost which the Bank of Hawaii has rendered against him because of him having not made the mortgage payments, will far exceed the $500,000 that was paid down, plus the monthly installments which are made of approximately $72,000.

THE COURT: The Court agrees with you on that point, based upon the figures that were submitted. Therefore, the Court will grant a cancellation of the Agreement of Sale and order that the property be returned to both Mr. Howard T. Lane. What happened to Margie Lane? She was on the Agreement of Sale also.

MR. GIBSON: She was on the Agreement of Sale as a buyer so we would cancel that Agreement of Sale Mr. Lane would be entitled to retain the —

THE COURT: Question: Do you have all the necessary parties?

MR. GIBSON: Yes, your Honor.

THE COURT: Are you going to cancel the Agreement of Sale?

MR. GIBSON: Mrs. Richardson is also a defendant in this action.

THE COURT: Let me see. All right, all right.

MR. GIBSON: So what we would ask for, your Honor, is a cancellation of the Agreement of Sale,

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retention of the funds, a writ of possession to issue forthwith, and leave to file a motion for attorney's fees and costs as the Court would deem reasonable.

THE COURT: All right. You may file an affidavit on the costs. However, the Court is inclined not to grant you $105,000 —

MR. GIBSON: Your Honor —

THE COURT: — unless it's in connection with the cancellation of the Agreement of Sale.

MR. GIBSON: Your Honor —

THE COURT: All right?

MR. GIBSON: I understand what your Honor is saying. I don't know if I'll be able to break that down — to what extent, I will. I will submit an affidavit, your Honor.

THE COURT: All right. Anything else?

MR. GIBSON: Nothing futher.

THE COURT: Excuse me. As far as the matter for the libel and slander is concerned, the Court will award each defendant $1.

MR. GIBSON: Thank you, your Honor. I think that's it.

THE COURT: Anything else?

MR. GIBSON: No.

THE COURT: All right.

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(The proceedings were concluded at 10:55 a.m.)

CERTIFICATE

I, Jonell Kaku, an official court reporter for the First Circuit Court, State of Hawaii, do hereby certify that I reported in machine shorthand all of the proceedings had in the above-entitled cause on Monday, January 21, 1985; and that the foregoing is a true and correct transcription of the notes so taken and transcribed by me to the best of my ability.

Dated this 23st day of January, 1985.

JONNELL M. KAKU, C.S.R. #138

Supreme Court, U.S.
FILED
OCT 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-472

In The

Supreme Court of the United States

October Term, 1987

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N. V., a Netherland Antilles corporation,

Petitioners,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, and THE FIDELITY STANDARD LIFE INSURANCE COMPANY,

Respondents.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Hawaii Intermediate Court of Appeals correctly affirmed the trial court's dismissal of Petitioners' complaint for lack of prosecution, pursuant to Hawaii R. Civ. P. 41(b), where, on the morning that jury trial was to begin, the Petitioners had left the jurisdiction and Petitioners' attorney left the courtroom and deliberately refused to comply with the trial court's order to proceed with their case?

2. Whether the Hawaii Intermediate Court of Appeals correctly declined to review the trial court's pretrial orders where to do so would violate the State of Hawaii's policies (1) against piecemeal appeals and (2) in favor of requiring an appellant to present an adequate record for the purposes of appellate review?

II.

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IV.

STATEMENT OF THE CASE

This Petition arises out of an action which was dismissed with prejudice for failure to prosecute when the Petitioners failed to appear for trial, and Petitioners' attorney, at the Petitioners' instruction, ignored the trial court's order to proceed, and walked out of the courtroom on the morning of trial.

The underlying action began with the purchase and sale of a luxury home in Honolulu, Hawaii for $1.35 million in June, 1981. About six months after the Petitioners (purchasers of the house and plaintiffs below), had executed an agreement of sale with Respondent Howard Lane (seller of the house and defendant below),[1] a heavy rainstorm occurred. Petitioners alleged that during the storm water leaked through portions of the walls of the house. Petitioners stopped payments under the agreement of sale in January of 1982. In March of 1982, Petitioners sued for specific performance or rescission of the agreement of sale, fraud, and for damages.

During the dispute and shortly before the Complaint was filed, Petitioner Leon Richardson sent a telex to Respondents accusing them of, *inter alia*, criminal fraud, and threatening to report Respondents to various public officials, including the U.S. Department of Justice, the Australian Embassy in Washington, D.C., and the Lieutenant Governor of the State of Hawaii. Following the

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[1] Respondents Willis Sinsabaugh and Waterfront Properties, Inc. were the seller's brokers. Waterfront Properties, Inc. has no parent, subsidiary, or affiliate companies; *see* Supreme Court Rule 28.1.

filing of the suit, Respondents counterclaimed for enforcement or cancellation of the agreement of sale and for damages for libel and defamation based upon this telex.

The trial on the claims involved in the complaint, counterclaim and crossclaims of the other parties was set for the week of January 21, 1985. As the Hawaii Intermediate Court of Appeals ("ICA") correctly states in its Opinion, the matter had, by then, degenerated into a battle over discovery proceedings. *Richardson v. Lane*, No. 11353, slip op. at 2 (Hawaii Intermediate Court of Appeals, April 3, 1987, as amended) ("Opinion"), reprinted in Petitioners' Appendix ("P.A.") at A-1 through A-11.

On January 16, 1985, Respondent Lane filed a Motion to Dismiss and for Sanctions pursuant to Hawaii R. Civ. P. 37 on the grounds that Petitioners had violated a Stipulation and Order issued by the Hawaii Circuit Court's Motions Judge on October 2, 1984 regarding the taking of depositions of expert witnesses. The motion was predicated on the Petitioners' willful violation of that discovery order in refusing to allow the Respondents to complete the depositions of two of Petitioners' expert witnesses and to commence the deposition of a third expert witness. Petitioners opposed the motion.

The motion was heard by the trial judge on January 17, 1985. After hearing argument from all parties and inquiring into the facts and circumstances surrounding the Motion, the court ruled that the Petitioners had failed to comply with the discovery order, and ordered that the

testimony of three expert witnesses be excluded from trial. P.A. "F".

Notwithstanding Petitioners' rhetoric to the contrary, this order did not deprive Petitioners of any constitutional right to jury trial or to due process. As shown by Petitioners' own Supplemental Pretrial Statement filed on January 17, 1985, Petitioners had listed over 27 fact witnesses and 15 expert witnesses. Respondents' Appendix ("R.A.") at B-2, B-3. Even without the three excluded expert witnesses, Petitioners had other engineering and architect witnesses available to testify. Moreover, Petitioners' claims were based on rescission, misrepresentation, specific performance and fraud, and expert witnesses were not necessary under Hawaii law to present a *prima facie* case.

Also on January 17, 1985, Lane filed a Motion to Dismiss on the grounds that Petitioners had failed to comply with a previous order orally made on December 5, 1984, and entered by the Circuit Court Motions Judge on January 14, 1985, requiring Petitioners to deposit forthwith, as security, "all payments due under the Agreement of Sale" which is the subject of this action ("Security Order"). The Security Order did not specify the exact amount to be deposited; however, by the end of 1984 the entire principal balance of the agreement of sale had become due and Respondent Lane was owed nearly $1,000,000, including interest and late fees. *See*, e.g., P.A. at L-21, lines 11-15.

This motion was heard by the Trial Judge on January 18, 1985. Petitioners orally opposed the motion. After argument, the trial court denied the motion to dis-

miss, but amended the order to specify that the amount to be deposited was $743,750.[2] The court further ruled that the sum was to be deposited by 9:30 a.m. on January 21, 1985. P.A. "G". The court, however, expressly refused to threaten any sanction for failure to comply with this ruling or with the Security Order. In fact, no sanctions were threatened or imposed against Petitioners for failure to comply with either order. *See* P.A. p. L-24, lines 13-16, and at M-9, lines 10-24.

On January 21, 1985 Petitioners did not appear for trial. Instead, Petitioners, through their attorney, submitted an "Affidavit of Plaintiff Leon D. Richardson Disqualifying the Honorable Edwin Y. Sasaki Pursuant To Section 601-7(b), H.R.S." in an attempt to stop this trial. *See* R.A. at "A". The affidavit, in substance, stated that the trial court was biased and partial based on the court's rulings involving the exclusion of three expert witnesses and the modifying of the order requiring sums to be deposited into court. In the affidavit, however, Petitioners acknowledged that they knew they could appeal those rulings. After considering the affidavit, the trial court declined to disqualify itself. *See e.g.* P.A. at M-5.

The court then called the case for trial. Respondents and their attorneys were present. The role of the jury *venire* was taken. At a bench conference following the roll call, Petitioners' attorney requested permission to take an interlocutory appeal, which was denied. P.A. at M-5.

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[2] Petitioners claimed that there was an oral modification of the payment terms. In specifying the amount, Judge Sasaki in fact gave the Petitioners the benefit of this doubt. *See*, P.A. at L-21, lines 7-10, 24-25.

Dr. Dubin then obstinately resisted all orders that he proceed:

> THE COURT: All right. Your objection is noted. We'll proceed with the trial.
>
> MR. DUBIN: On that basis, I will say that we do not waive our right to trial by jury.
>
> THE COURT: The jury panel is sitting right there.
>
> MR. DUBIN: *I'm instructed not to participate in these proceedings.*
>
> THE COURT: The panel is sitting right there. Mr. Dubin, and what you have been instructed to do, I don't know. We will proceed with the calling of the twelve.
>
> MR. DUBIN: I'm telling the Court that it is my legal opinion that I cannot participate in this proceeding and still protect the rights of my client. I would ask the Court, under these circumstances, to grant a continuance of one day so that I could at least have the opportunity to present a legal memorandum to the Court showing that the legal issues in this case, the trial judge does make decisions.
>
> THE COURT: Mr. Dubin, you knew from last week what was going to happen today. You've had all weekend to work on it. I don't see where one more day would help. We will proceed.
>
> * * *
>
> (End of bench conference).
>
> (Mr. Dubin left the courtroom).

See P.A. at M-9, 10 (emphasis added.)

Faced with the absence of the Petitioners and Petitioners' attorney, the court dismissed the complaint for lack of prosecution and entered a default against Petition-

ers as to the counterclaim. The court then dismissed the jury *venire*. Following entry of judgment, Petitioners appealed to the Hawaii Intermediate Court of Appeals.

On April 3, 1987, the ICA rendered its opinion affirming the trial court's dismissal of the Complaint with Prejudice and the entry of default. *Richardson v. Lane*, No. 11353, slip op., as amended. The ICA further specifically held that it would not review any of the alleged errors that occurred prior to the dismissal of the Complaint, as it had no record upon which to evaluate the effect of the orders and that to do so would violate Hawaii's policy against piecemeal appeals.[3] Opinion, at 7.

On May 4, 1987, Petitioners filed an Application for Writ of Certiorari to Review the Opinion filed April 3, 1987, amended by order filed April 22, 1987 upon reconsideration. By Order dated May 8, 1987, the Hawaii Supreme Court denied Petitioners' Application for Writ of Certiorari.

On May 19, 1987, the ICA filed a Notice of Entry of Judgment on Appeal and Judgment on Appeal.

On August 17, 1987, Petitioners mailed the subject Petition for Writ of Certiorari to the United States Supreme Court. The Petition was filed on September 21, 1987.

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[3] The original opinion of the Hawaii Intermediate Court of Appeals affirmed the trial court's granting of attorneys' fees and costs to Respondents Sinsabaugh and Waterfront Properties. By order dated April 22, 1987, the Court partially amended its opinion and reversed the trial court's granting of such fees and costs.

V.

ARGUMENT

A. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE.

The principal and dispositive issue presented to the ICA below is set forth in the first sentence of Section I of the Opinion:

> When plaintiffs' counsel informed the trial court that plaintiffs had instructed him not to participate further in the proceedings and left the courtroom, plaintiffs effectively abandoned their cause of action and the trial court correctly dismissed the complaint under Rule 41(b), Hawaii Rules of Civil Procedure (HRCP) (1980), for lack of prosecution. [Footnote omitted.] (Opinion at 4-5, Petitioner's Appendix A-5, A-6).

In deciding this issue, the ICA did not depart from any principles set forth in the decisions of this Court. See, for example, *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

Petitioners' refusal to proceed on the morning of trial, in direct violation of the trial court's order to do so, and with full knowledge that they had an appropriate remedy by way of appeal, was a deliberate waiver of their claims and their right to a review of the pretrial orders. Petitioners fail to present this issue directly for review by this Court. *See* Petitioners' Questions Presented. Therefore, this Court should not consider whether the dismissal of the Complaint was improper. Supreme Court

Rule 21.1(a); *Andrews v. Louisville & N.R. Co.*, 406 U.S. 320 (1972).

This case presents no special and important reasons for consideration or review by this Court. Supreme Court Rule 17. At best, the actions by Petitioners in this case are unlikely to be repeated with any regularity. Notwithstanding the uniqueness of the facts, the case presents no new issue of law or application of law which would justify granting certiorari.

The Opinion by the ICA is entirely consistent with this Court's rulings, with the rulings of other Federal Courts of Appeals, and with the rulings of other state courts of last resort. The rules of law applied in the ICA opinion neither depart from accepted judicial principles, nor decide important public questions that warrant review by this Court. *See,* sections V(C), V(D) and V(E), *infra.*

This case offers no opportunity for this Court to settle any important question of Fourteenth Amendment[4] due process principles which have not been heretofore settled by this Court.

B. CERTIORARI SHOULD NOT BE GRANTED AS THERE ARE INDEPENDENT AND ADEQUATE STATE GROUNDS WHICH SUPPORT THE DECISION OF THE HAWAII INTERMEDIATE COURT OF APPEALS.

After deciding that the trial court had properly dismissed the complaint and entered a default against the Petitioners, the ICA went on to hold that:

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[4] U.S. Const. amend. XIV.

> By refusing to proceed with the trial, plaintiffs left the trial court no choice but to dismiss their complaint. Plaintiffs' argument that the preclusion order was destructive of their case carries no weight against the record here. There is no way we can evaluate the effect of the Order because Plaintiffs' refusal to proceed has left us without a record of the remainder of their proof. Finally . . . we will not discuss alleged errors that occurred prior to the dismissal of the complaint, as to do so would be contrary to this jurisdiction's policy against piecemeal appeals. *Doe V v. Roe V*, 5 Hawaii App. 610, 704 P.2d 940 (1985) (footnote omitted).
>
> (Opinion at 7, Petitioner's Appendix at A-8).

The ICA's decision not to go beyond the dismissal below is fully supported by two important state interests in proper trial procedure. First, by voluntarily defaulting and allowing judgment to be taken against them, Petitioners improperly attempted to circumvent the state's recognized policy against piecemeal appeals. *Doe V v. Roe V*, 5 Hawaii App. 610, 704 P.2d 940 (1985); *Powers v. Ellis*, 55 Hawaii 414 (1971); *Catlin v. United States*, 324 U.S. 229 (1945). Although not directly at issue here, the Hawaii legislature has expressly stated that a trial judge's denial of a request for leave to take an interlocutory appeal is unreviewable by any court. Section 641-1(b), Hawaii Rev. Stat.

Second, Hawaii appellate procedure imposes the duty on the appellant to marshal an adequate record for the purposes of review on appeal. *Union Bldg. Material Corp. v. Kakaako Corp.*, 5 Hawaii App. 146, 152-153, 682 P.2d 82, 88 (1984); Haw. R. App. Proc. 10(b) and 11(a). This duty applies not only to the presentation of an adequate

existing record, but also to the creation of a meaningful record in the trial court. *See,* Hawaii R. Evid. 103(a)(2). By refusing to proceed with any proof, and by failing to make an offer of proof, Petitioners deprived the appellate court of any record of the effect of the pretrial orders. This prevented any useful review. *See* Opinion at p.7; P.A. at A-8. Moreover, the Petitioners' list of witnesses, R.A. B-1, B-2, submitted four days before trial, shows that proceeding to trial would not have been a futile act.

The alleged constitutional errors in the pretrial rulings had not been properly presented to the ICA, and review was properly precluded by legitimate and recognized state policies. The ICA's ruling being supported by these policies, and there being no improper evasion of the constitutional issues by the ICA, this Court should also refuse to review them. *See, Wolfe v. North Carolina,* 364 U.S. 177 (1959).

C. THE PRETRIAL ORDERS WERE NEITHER DISPOSITIVE OF THE CASE NOR FINAL FOR THE PURPOSE OF APPEAL.

In an effort to evade the effect of their voluntary default at trial, Petitioners argue that the pretrial orders were somehow dispositive of their case. Petitioners also claim that the doctrine against piecemeal appeals has "lost favor." *See* Petitioners' Brief at 31-33, citing *Forgay v. Conrad,* 47 U.S. (6 How.) 201 (1848) and *Anderson v. Allstate Insurance,* 630 F.2d 677 (9th Cir. 1980). Petitioners' contentions are unsupported. *Forgay* involved a decree which adjudicated rights to, and possession of certain property. The only issue left for adjudication was an adjusting of accounts between the parties. *Ander-*

son involved in a case in which finality had been achieved and "there was nothing left to be decided." *Anderson*, 630 F.2d at 681.

This Court's recent cases have consistently upheld the policy against appeals of an interlocutory order, especially where the order is not dispositive of the case and is fully reviewable on appeal from a subsequent final judgment. *Richardson-Merrell, Inc. v. Keller*, 472 U.S. 424, 430-31 (1985); *United States v. Hollywood Motor Car Company, Inc.*, 458 U.S. 263 (1982); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

Here, contrary to Petitioner's claims, none of the pretrial orders was destructive of Petitioners' case. None of the orders would be unreviewable after judgment:

(1) The affidavit which was filed in an attempt to disqualify the trial judge was insufficient under Hawaii law since adverse pretrial rulings cannot form the basis for disqualification. *Glover v. Fong*, 39 Hawaii 308, 316 (1952). No inadmissible "facts" were argued to the trial court during the pretrial motions. Furthermore, the affidavit did not, in and of itself, prevent the trial from proceeding. *McKeague v. Talbert*, 3 Hawaii App. 646, 652-655, 658 P.2d 898, 904-905 (1983); *State v. Iaea*, 55 Hawaii 80, 515 P.2d 219 (1973).

(2) Petitioners have also grossly exaggerated the order requiring the deposit of the payments due under the agreement of sale into court. Before the action began in March of 1982, Petitioners refused to make any further payments under the agreement of sale, and at the time of trial Petitioners owed Respondent Lane nearly $1,000,000 including the entire balance which fell due in January of

1983. Petitioners had also refused to relinquish possession of the house. If Respondent Lane had prevailed on the counterclaim for enforcement or if Petitioners had prevailed on their claim for specific performance, Petitioners would have had to pay at least $500,000 for the property even assuming offsets for any necessary repairs. Petitioners, however, were not residents of the United States, and there was no indication that they had substantial assets in the jurisdiction which could provide reasonable security that any judgment could be paid. Under the circumstances, the Circuit Court did not abuse its discretion in requiring the posting of reasonable security.

Moreover, this was not, as Petitioners characterize it, an "over-the-weekend" order. The motion was originally heard before the Circuit Court motions judge in September of 1984. An order was orally rendered on December 5, 1984. The amount was not specified in the order, but the parties were well aware of what the order meant.

Finally, and perhaps most importantly, the record is clear that the trial judge neither enforced nor threatened to enforce this order prior to trial. *See* P.A. L-24, lines 13-16 and p.M-9, lines 1 through 24.

(3) Petitioners' argument that the alleged "preclusion order" was destructive of their case is also contradicted by the record. First, the ICA correctly realized that Petitioners had failed to preserve an adequate record for review of the order. Opinion at 7, P.A. at A-8. There was no attempt to put on any evidence, nor was any required offer of proof made. *See* Haw. R. Evid. 103(a)(2).

Second, Petitioners had at least 39 other fact and expert witnesses remaining to testify as to the elements of their various claims. For example, Petitioners could have prevailed on their count for rescission by proving a material breach of the agreement of sale through Petitioners' numerous fact witnesses: for example, Frappia, Spivak, Barwick, Thursby, the Vilorias, Queriones and Petitioners themselves.[5]

Petitioners could have proved special damages through two other experts, Norman Lacayo and Dennis Shiu. Mr. Lacayo was an architect and had performed an inspection of the property soon after the alleged damages occurred. Shiu, Smith, Gray, Iida and Nakagawa all had engineering backgrounds and were listed to testify. Dr. Lum was available to testify as to general damages.

As to claims of misrepresentation, Petitioners themselves were listed to testify, as well as Spivak, Barwick, Coleman, Respondent Lane, and Respondent Lane's children. Finally, as to breach of duty by Respondents Sinsabaugh and Waterfront Properties, Inc., Petitioners had their real estate expert witnesses.

This cursory review of the pretrial pleadings directly contradicts Petitioners' contention that the preclusion order completely destroyed their case. Attorney Gibson's statement that Lipman's architect report was the "guts" of the case may have indicated his recognition that the architect's report was a significant factor, but it is by no means a concession that it was essential.

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5 See R.A. at B, and Record ("R") at Vol. IX at 43-75, Petitioners' Pretrial Statement.

There is no unfairness in a rule which requires a party to follow the proper procedure, regardless of adverse evidentiary and pretrial rulings, especially where proof on the essential elements of the case was still intact. There is thus no reason for this Court to review the pretrial rulings as destructive of Petitioners' case.

D. THE DECISION OF THE HAWAII INTERMEDIATE COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

Neither *Hammond Packing Co. v. Arkansas*, 21 U.S. 322 (1908), *Societe International Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958) nor any other case cited by Petitioners is inconsistent with the holding of the ICA. The cases cited by Petitioners do not involve comparable factual situations. These cases address the issue of the courts' discretion to impose discovery sanctions and expressly recognize that a court has the power to render orders such as those at issue here. *See, e.g. Link v. Wabash*, 317 U.S. 626. Petitioners have consistently failed to address the key issue presented by this case—whether the trial court abused its discretion in dismissing this case with prejudice when the Petitioners contumaciously refused to proceed on the morning of trial.

E. THE DECISION OF THE HAWAII INTERMEDIATE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THE FEDERAL COURTS OF APPEALS.

1. Third Circuit

Contrary to the Petitioners' contentions, the decision of the ICA is properly based on the decision of the Third Circuit in *Marshall v. Sielaff*, 492 F.2d 917 (3d Cir. 1974).

Petitioners' attempt to distinguish *Marshall* is wholly inaccurate. *See* Six Points in Petition at pp. 30-31. First, contrary to Petitioners' characterization of the case, the Third Circuit Court of Appeals expressly refused to reach the merits of the question as to whether the district court correctly decided the issue of jurisdiction over the other witnesses. Second, the court never reached the question as to the need for the witnesses; in fact, in *Marshall,* as here, the petitioner claimed that the witnesses were "essential." *Marshall,* 492 F.2d at 918. Third, there is no indication in *Marshall* as to the expected length of the trial.

Fourth, the *Marshall* opinion does not state that findings and conclusions were made as to the preclusion order. Fifth, the Third Circuit Court of Appeals expressly refused to consider the preclusion orders, contrary to Petitioners' statement. Sixth, the *Marshall* trial court's consideration of lesser sanctions was never discussed, and Petitioners' conjecture as to what was in the record is entirely inappropriate.

In short, there are no factual distinctions between the *Marshall* case and the instant case which prevent the ICA from following the Third Circuit's thoughtful rationale.

It must further be emphasized that contrary to Petitioners' assertion, *Marshall* has not been "abandoned" in its own jurisdiction by *Reif v. A.H. Robbins,* 90 F.R.D. 526 (E.D. Pa. 1981). *Reif* did not involve a dismissal for failure to prosecute where the plaintiff had wilfully refused to proceed with trial. Thus, the *Reif* court did not even discuss the specific holding of *Marshall.* The *Reif* court

simply cited *Marshall* for the general proposition that dismissal for failure to prosecute is "a harsh remedy and should be resorted to only in extreme cases." This is hardly a basis for claiming that the Third Circuit has abandoned *Marshall*.

Indeed, the Third Circuit expressly relied upon *Marshall* in deciding the subsequent case of *Sullivan v. Pacific Indemnity*, 566 F.2d 444 (3d Cir. 1977). In *Sullivan*, the trial court dismissed plaintiffs' claims when the plaintiffs refused to proceed to trial after the trial court denied its request for class certification. The Third Circuit dismissed the appeal, and held, in reliance on *Marshall*, that it would not review the pretrial ruling on the basis that it would not allow the plaintiff to circumvent the proper appellate processes.

2. Other Circuits

The ICA's decision is also consistent with *Hughley v. Eaton Corporation*, 572 F.2d 557 (6th Cir. 1978) and *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979) (quoting extensively from *Marshall*, *Sullivan*, and *Hughley*). Also as explained above, contrary to Petitioners' assertions the ICA decision does not conflict with the Ninth Circuit's decision in *Anderson v. Allstate Insurance Co.*, 630 F.2d 677 (9th Cir. 1980).

F. HAWAII'S CIVIL JUSTICE SYSTEM PROTECTS PETITIONERS' CONSTITUTIONAL RIGHTS.

The Petitioners' complaints concerning Hawaii's civil justice system are completely groundless. Petitioners were never denied the opportunity to present their case. When the Petitioners were faced with two adverse pretrial rulings, they deliberately disobeyed the trial court's order to

begin trial, intentionally waived their claims and improperly sought to appeal the interlocutory orders.

No "substantive justice" was sacrificed to the interest of court administration. The trial judge appointed to preside over this jury trial was not engaged in any conspiracy or administrative "railroading." The Hawaii Constitution expressly authorizes Judge Sasaki's assignment to hear this case below and no proper challenge has been made to this provision by Petitioners herein. *See* Hawaii Const. art. VI, sec. 2.

The arbitrary and capricious conduct at issue here was that of Petitioners themselves. Respondents respectfully urge this Court to deny the Petition herein, and respectfully assert their right to the protection of a further, legitimate state interest—that of protecting a defendant against continued uncertainty and undue delay in the vindication of his or her claims. *See Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977); *H.R. Livermore Corp. v. Aktiengesellschaft Gebruder*, 432 F.2d 689, 691 (D.C. Cir. 1970).

G. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS UNTIMELY SUBMITTED.

As a final matter, Respondents note that the Petition, originally submitted on August 17, 1987, was returned to Petitioner as out-of-time. *See* Supreme Court Rule 20.3. Respondents agree that the Supreme Court Clerk was correct in doing so, and the Petition should be dismissed as untimely filed.

This Court has held that a State appellate court's judgment is final for the purposes of Certiorari when the "record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication

is not subject to further review by a state court." *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). United States Supreme Court Rule 20.4 emphasizes that this date is *not* the date of "the issuance of the mandate (or its equivalent under local practice)."

Under the Hawaii Rules of Appellate Procedure (H.R.A.P.), the "decision" of an appellate court is rendered at the time of the filing of its opinion, memorandum opinion, or order. The filing of the opinion or ruling by the ICA starts the time periods running for further review. *See* H.R.A.P. 31(e) and 40(a).

H.R.A.P. 41(a) expressly sets the date by which the decision of an appellate court becomes final:

> The timely filing for a Motion for Reconsideration shall stay the finality of the decision until the disposition of the Motion unless otherwise ordered by the Court. The timely filing of an Application for a Writ of Certiorari shall stay the finality of the decision unless otherwise ordered by the Supreme Court. *If the Application for a Writ is rejected, the decision shall be final as of the date of rejection.* (Emphasis added).

Thus, the decision of the ICA is final and not subject to reconsideration or alteration following the date of the denial of an Application for Writ of Certiorari. This express statement of finality thus distinguishes this case from *Marquette Nat. Bank v. First of Omaha Corp.*, 439 U.S. 299 at n.18 (1978) (decided under Minn. Rules Civ. App. Proc. 136.02, 140).

The subsequent judgment submitted pursuant to H.R.A.P. 41(b) cannot have the effect of altering, amending, or reopening the decision. Respondents assert that

this document neither orders nor adjudges any issue, and contains little more than a recital of the disposition of the lower court's ruling by the appellate court. In effect, it is the jurisdictional "mandate" under local practice and under Supreme Court Rule 20.4. *See* P.A. at Exhibits D. and E. This case is also, therefore, distinguishable from *Puget Sound Power & L. Co. v. King County*, 264 U.S. 22, 24-25 (1923) which was decided before the adoption of current Supreme Court Rule 20.4.

In *McCarthy v. Jaress*, — Haw. App. —, 711 P.2d 1315, 1318 at n.5 (1985), the ICA ruled that the entry of judgment and notice of entry of judgment revest jurisdiction over the merits of the case in the Hawaii Circuit Courts. In so ruling, the ICA compared the filing of a Federal District Court "Judgment", which starts the time from which appeals must be taken under the Federal Rules of Appellate Procedure, to the ICA's opinion, which starts the time running for further review under the H.R.A.P. By necessary implication, under the H.R.A.P. the "Final Judgment" is equivalent to the "mandate" issued by the Federal appellate courts.

The Petitioners' Application for Writ of Certiorari to the Hawaii Supreme Court in this case was denied on May 8, 1987. Petitioners' attempted submission of the Petition on August 17, 1987 was therefore out-of-time, and the original rejection of the Petition by the Office of the Clerk was correct.

Petitioners may argue that the judgment of the ICA is somehow "reopened" or amended by a subsequent granting of costs and attorneys' fees. Under H.R.A.P. 39, the

awarding of costs and fees does not reopen the judgment; rather, only an Amended Notice of Entry of Judgment is issued. Moreover, an award of costs and fees is predicated on the fact that the underlying claims involved in the suit have been finally decided in favor of the party seeking them. Therefore, the issue of costs and fees is collateral to and separate from the issues already finally decided. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1981); *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984).

Respondents therefore respectfully urge this Court to deny the instant Petition as being untimely submitted.

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VI.

CONCLUSION

Petitioners' utter disregard of the trial court's orders to begin trial, and their deliberate default on the morning of trial, properly resulted in the dismissal of the complaint with prejudice and the entry of default. For the above-stated reasons, Respondents respectfully request that the Petition for Certiorari be denied.

DATED this 20th day of October 1987 at Honolulu, Hawaii.

ASHFORD & WRISTON

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LORRIN B. HIRANO

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Howard T. Lane

CASE & LYNCH

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CATHY A. LEE

Counsel for Respondents
Willis Sinsabaugh and
Waterfront Properties, Inc.

No. 87-472

—o—

In The

Supreme Court of the United States

October Term, 1987

—o—

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N. V., a Netherland Antilles corporation,

Petitioners,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, and THE FIDELITY STANDARD LIFE INSURANCE COMPANY,

Respondents.

—o—

APPENDIX

—o—

GARY VICTOR DUBIN 3181
Attorney at Law
Suite 800
345 Queen Street
Honolulu, Hawaii 96813
Telephone No. 537-2300

Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEON D. RICHARDSON, et al.,	) CIVIL NO. 70332
Plaintiffs,	) AFFIDAVIT OF PLAINTIFF LEON D. RICHARDSON
vs.	) DISQUALIFYING THE HONORABLE
HOWARD T. LANE, et al.,	) EDWIN Y. SASAKI
Defendants,	) PURSUANT TO SECTION 601-7(b)
and	) OF THE HAWAII REVISED STAT-
THE FIDELITY STANDARD LIFE INSURANCE COMPANY,	) UTES; COUNSEL'S CERTIFICATE OF GOOD FAITH; EXHIBITS 1 AND 2
Intervenor/ Defendant.	) Trial: January 21, 1985

AFFIDAVIT OF PLAINTIFF LEON D. RICHARDSON DISQUALIFYING THE HONORABLE EDWIN Y. SASAKI PURSUANT TO SECTION 601-7(b) OF THE HAWAII RREVISED STATUTES

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

LEON D. RICHARDSON, being first duly sworn on oath, deposes and says:

1. I am a Plaintiff in the above action. My wife and I came to Honolulu from Hong Kong a few days ago to meet with out [sic] trial counsel, Mr. Dubin, to prepare for the jury trial of this case commencing January 21, 1985.

2. This has been a long ordeal for both of us and we were most anxious to get the trial underway and to resolve this legal dispute with these Defendants at this time.

3. Following our arrival, our trial preparation has been completely interrupted by two events: the filing of two motions to dismiss by Defendant Lane, for hearing before Judge Edwin Y. Sasaki, who our counsel and we learned on January 15, 1985, had been designated as the trial judge for our trial.

4. My counsel, Mr. Dubin, has informed us that we will have a mixed trier of fact, that is, that some of the issues will be decided by the trial judge and some by the jury. We understand that the jury will be picked at random from the community. And naturally we have fully expected that this Court would appoint a trial judge who would be neutral at the trial and would go into the trial not having taken a stance against us.

5. Defendant Lane's motions to dismiss, however, coming before the trial but presented nevertheless to the "trial" judge, Judge Sasaki, have, my wife and I feel, made it impossible to get a fair and impartial trial before Judge Sasaki who we believe to be prejudiced and biased against us as a result of his having been called upon by Defendant Lane to hear and make rulings before trial on

some of the very same issues that will directly and indirectly have to be decided at trial according to the evidence presented at trial and not before, as we understand the law and common sense.

6. We are not lawyers. Mr. Dubin, in his Certificate of Good Faith which accompanies this Affidavit, provides the legal details of the manner that Judge Sasaki has, because of these two pretrial motions, lost, in our view, his objectivity and impartiality for serving as the trial judge.

7. In layman's terms, my wife and I have no confidence that we can get a fair trial with him now because his ruling on Defendant Lane's motions to dismiss, before the trial, show to us a bias against us. He has made his rulings without the benefit of a trial or what Mr. Dubin refers to as an "evidentiary hearing" and His Honor has shown, we deeply feel, a mental attitude bent on believing Defendant Lane and his counsel and not us. There is in our view simply no other explanation for his decisions against us.

8. We, of course, understand that we can appeal his decisions which we do not like. What makes him objectionable to us as our *trial* judge is that we feel that the trial judge should and must go into the trial without preconceived notions regarding the merits of the dispute. He should be controlled in his decision making by what transpires at the trial and the evidence presented there, and should not have already made up his mind against us and our legal position which his ruling this week clearly shows.

9. We feel that Defendant Lane's two motions to dismiss should have been heard by other than the trial

judge. Judge Sasaki in our view is now hopelessly contaminated by, for example, the nonevidential statements and misrepresentations made by Attorney Gibson to him in oral hearing which would never have been permitted before the trial judge, we assume, at trial. The fact that Judge Sasaki has ruled adversely to us based on such nonevidence makes us reasonably believe that he is disposed against us now, for we are at a loss otherwise to understand how he has ruled as he has done.

10. As our trial judge, we would have no way of now combatting the false images of us and the preconceived notions he has of us as a result of what Attorney Gibson has argued to him in pretrial motion practice. He obviously has opinions on the merits adverse to us which he has formed *before* trial and which he will unfairly bring with him to the trial. Since the key issue in this case is rescission and, as we have been told by Mr. Dubin, that issue is substantially decided by the trial judge, there is simply no way we can accept his judgment now since before trial he has ruled so harshly against us.

11. I have instructed my attorney to file this affidavit before trial commences Monday, January 21, 1985, at 9:30 a.m. My wife and I are entering our 70s. We are not in good health. The thought of having Judge Sasaki as the "impartial" trial judge for our case which we brought against these Defendants has caused us both great mental anguish. We want only an uncommitted trial judge who is impartial and who has not made up his mind

already on the same issues that are to be tried. We really do not understand why we would be denied this simple requirement of justice.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Leon D. Richardson
LEON D. RICHARDSON

Subscribed and sworn to before me
this 18th day of January 1985.

/s/ Scott Totan
Notary Public, State of Hawaii
My Commission Expires 4-23-88

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEON D. RICHARDSON, et al.,	) CIVIL NO. 70332
Plaintiffs,	) PLAINTIFFS' SUPPLEMENTAL PRETRIAL
vs.	) STATEMENT
HOWARD T. LANE, et al.,	)
Defendants,	)
and	)
THE FIDELITY STANDARD LIFE INSURANCE COMPANY,	)
Intervenor/ Defendant.	)

PLAINTIFFS' SUPPLEMENTAL PRETRIAL STATEMENT

Come now Plaintiffs all, pursuant to Rule 12(a)(10) of the Rules of the Circuit Courts of the State of Hawaii, and hereby submit this Supplemental Pretrial Statement,

amending their Pretrial Statement filed May 23, 1984, as follows:

* * *

APPENDIX A [NEW]:

List of Fact Witnesses

1. Leon D. Richardson
2. Margie J. Richardson
3. Armel J. Frappia
4. Frederick Ross Spivak
5. Donna Barwick
6. Robert Thursby
7. Corazon Viloria
8. Marysia Coleman
9. Willis Sinsabaugh
10. Barbara Jean Okada
11. Howard Lane, Jr.
12. Gregory Lane
13. Judith Lane
14. Anne Lewis
15. Dave Lewis
16. Ted Chinn
17. Lee Grady
18. Howard Lane, Sr.
19. Ginger Sinsabaugh
20. Eugenio Queriones
21. Nancy Beckner
22. Sue Gross
23. Juan Viloria

24. Representative of Bishop Estate (John R Peterson or another)
25. Representative of Kaiser Development Company (Riley Smith or another)
26. Representative of Fireman's Fund Insurance (Sharon Takao or another)
27. Representative of Building Department, City and County of Honolulu
28. Rebuttal Witnesses as Required
29. Authenticating Witnesses as Required
30. Newly-Discovered Witnesses as Available

APPENDIX B [NEW]:

List of Expert Witnesses

1. Jack Lipman
2. Joseph A. Dobrowolski
3. Norman Lacayo
4. Denis T. Shiu
5. Russell L. Smith
6. Brian L. Gray
7. Edward Iida
8. Stephen B. K. Moon
9. Evelyn Hayase
10. Kwong Yen Lum, M.D.
11. Jerry Nakagawa
12. Helen Price
13. Steven Hidano
14. James Tamura
15. Paul Hirata

Supreme Court, U.S.
FILED
DEC 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-472

In the Supreme Court of the United States

October Term, 1987

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,

Petitioners,

vs.

HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, and The Fidelity Standard Life Insurance Company,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

GARY VICTOR DUBIN
Counsel for Petitioners
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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This Petition is filed pursuant to Supreme Court Rule 51 in order to prevent serious injustice to Petitioners and to preserve the integrity of the review processes of this Court, on the grounds that intervening circumstances of a substantial and controlling effect require such reconsideration by this Court.

POINT I

REHEARING OF PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI IS JUSTIFIED AS A RESULT OF DELIBERATELY FALSE AND PREJUDICIAL MISREPRESENTATIONS TO THIS COURT CONTAINED IN RESPONDENTS' JOINT BRIEF WHICH PETITIONERS HAVE HAD INSUFFICIENT TIME TO CORRECT IN THE RECORD OF THIS PROCEEDING.

The original Petition for Writ of Certiorari was filed and docketed in this Court on August 17, 1987, precisely on the ninetieth day following entry of the judgment below[1], and upon enlargement of time Respondents' Joint Brief was filed by mail from Nebraska on October 20, 1987, copies not reaching Petitioners' attorney in Honolulu until October 26, 1987.

Petitioners' attorney is a sole practitioner involved in trial matters at the time of receipt of Respondents' Joint

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1. The Clerk of the Court initially refused to accept the original Petition as out-of-time, but withdrew his objection on September 17, 1987, following further explanation from Petitioners as to Hawaii law and practice as set forth in the correspondence reprinted in Appendix C hereto.

Brief, and was in the process of having Petitioners' Reply Brief printed when word was received that the Court had denied the Petition for Writ of Certiorari on November 16, 1987, within but three weeks of receipt of the opposition brief.

While Petitioners fully understand that Supreme Court Rule 22.5 provides that this Court's decision will not be delayed pending receipt of reply briefs, Respondents' Joint Brief presented to this Court *two material misrepresentations* of such gross magnitude as to make it fundamentally unfair that Petitioners' important constitutional issues should be decided upon a contrived opposition record when Petitioners were effectively denied any meaningful opportunity to respond.

These Petitioners have no way of knowing to what extent such false reporting to this Court influenced its lightning-speed consideration of the original Petition, and therefore have no recourse but to pray that they may be heard upon rehearing by this Court.[2]

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2. Petitioners' counsel has filed, attached hereto, his Certificate of Good Faith, as required by Supreme Court Rule 51.2. While Petitioners would have preferred to have assisted this Court more fully by having had sufficient time to refute all of the many inaccurate statements of law and fact found in Respondents' Joint Brief, this Petition is necessarily limited to their gross misrepresentations that may have caused the denial as intervening circumstances thought controlling in effect.

POINT II

THE TRIAL JUDGE PRECLUDED VIRTUALLY ALL OF PETITIONERS' EXPERT WITNESSES AND EXPERT REPORTS, WHICH WAS IN EFFECT A DISMISSAL OF THEIR CASE BELOW, BEFORE TRIAL, AND WITHOUT ANY EVIDENTIARY HEARING AND EVEN ANY FINDINGS OF FACT, NOTWITHSTANDING RESPONDENTS' DELIBERATELY FALSE AND PREJUDICIAL MISREPRESENTATION TO THIS COURT THAT PETITIONERS HAD TWELVE OTHER EXPERTS WHO COULD HAVE TESTIFIED IN PLACE OF THOSE PRECLUDED.

The central core of Petitioners' constitutional case is that they were *precluded* from using their experts to prove liability and damages at their jury trial *before* it commenced, which was tantamount to a *dismissal* on January 17, 1985, and that that was the reason that they could not proceed to trial on January 21, 1985; moreover, this abrupt decision was made by a temporary judge[3] unfamiliar with the case who had never before presided over a jury trial.

Respondents' response to this factual recital by Petitioners was that, according to Petitioners' "Pretrial Statement" they had twelve more experts who could have testified in support of their case.[4] Were this of course

---

3. The constitutionally frightening process whereby a chief justice can appoint colleagues at random to sit as circuit court judges and then preside over appeals that test their competency and his wisdom at selection in a state having a small judiciary should speak for itself.

4. See Respondents' Joint Brief in Opposition, at 13, and their Appendix B-3. The importance of expert witnesses in a building defects action should also speak for itself.

true, which it is not, Petitioners' *inability* to go to trial on January 21, 1985, would then easily be viewed as a dismissal on that date (and not January 17th) caused by them.

Respondents' argument that Petitioners had twelve other experts able to support their case is false, and Respondents know it to be false, intentionally attempting to mislead this Court.

The practice of preparing such Pretrial Statements in Hawaii practice is to recite all *possible* witnesses who might be called, not to create a roll for calling experts at trial.

When Respondents took the sworn deposition of precluded expert Lipman[5] they were told that the other experts were just briefly contacted for second opinions and had neither the knowledge of the construction defects or had put in sufficient time to have qualified as trial experts. This is fully explained in the transcript of Lipman set out in part as Appendix A to this Petition.

Indeed, the record below already underscores that Petitioners had no other experts capable of replacing those precluded, as the following comparison chart in the record[6] shows:

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5. It is more than significant to note that the abrupt preclusion order was procured on the representation without hearing that the Respondents were unable to have sufficient time to have taken Lipman's deposition before trial, ignoring 762 pages of transcript.

6. Record below, Volume XV, pp. 87-117, at 6.

Name of Expert	Money Paid	Pages in Reports	Transcripts
(*precluded)			
Lipman*	$25,000	103 pages	762 pages
Hidano*	16,000	2 pages	69 pages
Dobrowolski*	7,000	18 pages	0 pages
Iida	382	3 pages	60 pages
Lacayo	300	3 pages	15 pages
Smith	280	3 pages	47 pages
Tamura	0	1 page	14 pages
Gray	603	2 pages	19 pages

Respondents go so far as to tell this Court that architect Lacayo could have substituted for Lipman, when, at Lacayo's oral deposition before trial Lacayo testified that he had not even seen the house for several years, asking "What am I here for?" That may be why Lacayo's deposition was taken by Respondents for two minutes who here tell this Court Petitioners could have used him.[7]

The suggestion that Petitioners walked out of trial is ludicrous as the record recites that just before trial (and before Judge Sasaki) Petitioners had been offered a settlement amount of $650,000 over and above keeping a multi-million-dollar residence which offer Petitioners refused the day before the preclusion ruling was made.[8]

When Respondent's attorney Gibson used the argument that the precluded experts were "the guts" of Petitioners' case, to get the preclusion order, he knew the importance of

---

7. Appendix B to this Petition; see Respondents' Joint Brief, at 13.

8. Record, Volume XVI, 77-88; while settlement discussions are normally privileged, no objection was made to such information being entered into the record below by any party.

stopping Lipman, Hidano, and Dobrowolski from testifying. It is clearly dishonest advocacy to now argue before the United States Supreme Court that these precluded experts were not really needed by Petitioners.[9]

The dismissal of the action below therefore occurred on January 17, 1985, and the constitutional issues are ripe for adjudication, for, by January 21, 1985, when the case was formally dismissed, Petitioners had been denied their constitutional rights as explained within their original Petition. Respondents have unforgivingly deliberately misrepresented the record below in clear disrespect of the processes of this Court.[10]

POINT III

THE CLERK OF THE COURT WAS CORRECT IN ACCEPTING PETITIONERS' ORIGINAL PETITION FOR WRIT OF CERTIORARI AS TIMELY SUBMITTED AS OF AUGUST 17, 1987, NOTWITHSTANDING RESPONDENTS' MISREADING OF THE ENTRY-OF-JUDGMENT PROVISIONS OF HAWAII LAW.

The judgment below was entered on May 19, 1987, following its rehearing; although review by the Hawaii

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9. The rest of Respondents' arguments as to preclusion are equally flawed; for example, they recite that the ICA refused review, as the record of the importance of the precluded experts was not shown; that argument fails to distinguish between exclusion and preclusion, and the ICA was more interested in what the rest of the evidence available might have shown, a different topic.

10. Such misstatements started with the temporary trial judge and have not stopped since; when the system permits a dismissal without any evidentiary hearing, such dishonest advocacy is encouraged.

Supreme Court was denied Petitioners on May 5, 1987, the time for such review by other parties to the appeal did not expire until May 18, 1987, hence the May 19, 1987, entry date.

Exactly ninety days thereafter Petitioners' application for writ of certiorari was filed with the Clerk of this Court, on August 17, 1987.

Although at first questioned, following the correspondence with the Clerk's Office set forth in its entirety in Appendix C hereto, the original Petition was accepted and docketed as of August 17, 1987.

The Clerk of the Court made the proper decision.

Section 2101(c) prescribes such filing ninety days *after the entry of judgment* within which to make application, and Respondents concede in their Joint Brief that the question of when such entry occurs is a matter of state law[11], for, although this Court must regulate its own jurisdiction, the statute is silent as to what constitutes entry of judgment, which varies by jurisdiction.

There is *no* ambiguity in Hawaii law. Both the Hawaii Legislature and the Hawaii Supreme Court have ruled that in our State the "entry of judgment" is *and only is* "the filing of the judgment" by the clerk of the court, even though that procedure differs with the federal approach and most of the other states.

This very question was confronted in 1961 in *Marn v. Reynolds*, 44 Haw. 655, 657-658.

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11. Respondents' Joint Brief, at 18-20.

In *Marn,* surprisingly ignored by Respondents, the appellant tried to argue, as Respondents have, for an earlier running of the entry-of-judgment period. The Hawaii Supreme Court rejected the argument, definitively ruling that in Hawaii there is *no effective judgment* until such time as one is *filed* and that is the only point at which the time for appeal runs:

> Such contention . . . is without merit, for Rule 58 of the Hawaii Rules of Civil Procedure, unlike the Federal Rules in this respect, provides *in haec verba:* "The filing of the judgment in the office of the clerk constitutes the entry of judgment; * * * ." The language is crystal-clear. . . . Pointing, nevertheless, to the existing variance between the Hawaii Rules and the Federal Rules as to what constitutes "entry of judgment," counsel insists that this court "act now to amend Rule 58 by judicial decision." Suffice it to say that we will not ignore the clear language of Rule 58. . . . This Court recognizes that the Hawaii Rules of Civil Procedure were patterned after the Federal Rules. Certain changes, however, were advisedly made to harmonize with local practice of long standing. One of them was to define "entry of judgment" in the language above quoted.

There is nothing in *McCarthy v. Jaress*, 711 P.2d 1315 (1985), cited by Respondents as their only state authority, contrary to the *Marn* decision of the Hawaii Supreme Court. In *McCarthy,* the ICA in fact held that Hawaii law does differ from that in the federal system with respect to entry-of-judgment, and that the starting point for the appeal period is the actual filing of the judgment, exactly as Petitioners have alleged and the Clerk's office has accepted in this proceeding.

This is not a surprising result when one understands that in Hawaii the ICA is not separate from, but a structural part of, the Hawaii Supreme Court, as explained in the materials presented to the Clerk of this Court set forth in Appendix C, particularly pages C-23 through C-26 and the official state judiciary chart reprinted on page C-18. Hence, the application for review in the Hawaii Supreme Court from any ICA decision is treated as a request, in effect, for a rehearing by the Hawaii Supreme Court, a one-layer appellate process.

The first and only judgment entered on appeal in this proceeding below occurred on May 19, 1987, exactly ninety days from before the submission of the original Petition, by the express words of Hawaii Rule 36 governing our appellate procedure:

> The filing of the judgment below constitutes entry of judgment.

Even in the federal system the authorities agree that in our situation, following a rehearing in the ICA and its amended judgment filed May 19, 1987, that would also be the starting point for starting the Section 2101(c) clock anyway, as further explained in the correspondence with the Clerk's Office in Appendix C; *Scofield v. N. L. R. B.*, 394 U.S. 423 (1969) (identical procedural rules as to entry of judgment and notice of entry as found in Hawaii); *Marquette National Bank of Minnesota v. First of Omaha Service Corp.*, 439 U.S. 299 (1978) (where re-

hearing, as here, the ninety days runs from the date of subsequent entry of judgment and not when the rehearing was denied).[12]

Moreover, even the Supreme Court Rules are not free from ambiguity on this point, for Rule 20.4 states that where there was a rehearing, as here (by the ICA which granted relief to the Petitioners in part), the time for filing the petition runs from the date of the entry of a subsequent judgment entered on the rehearing, and no such subsequent judgment was ever filed by the ICA until May 19, 1987.[13]

Finally, any doubt as to the timeliness of the original Petition was surely removed when by order of the ICA below, dated June 16, 1987 (sixty-two days before the submission on August 17, 1987, to this Court of the original Petition), the decision challenged below was further changed as set forth in Appendix C and properly brought also to the attention of the Clerk of the Court, but not a part of the original Petition since it was prepared and accepted for filing as of August 17, 1987, prior to this issue having arisen.[14]

———o———

12. This Court has even on occasion considered petitions out-of-time; see *Deal v. Cincinnati Board of Education,* 402 U.S. 962 (1971).

13. No judgment could be filed under Hawaii appellate practice until ten days after review time ran for *all* parties to the appeal.

14. See Appendix C-13 and C-14.

CONCLUSION

These Petitioners have lost millions of dollars even though there has never been a *single* minute of evidentiary hearing in this matter and not even *any* findings of fact made prior to the dismissal of their action through preclusion of their expert testimony by the trial judge *before* trial.[15]

On appeal, the state courts have refused to examine the constitutional issues presented on the theory that Petitioners, in their seventies, were required to go through a mock trial without their evidence in order to prove that they could not otherwise win, in order to preserve constitutional guarantees.

On petition to this Court, their application has been denied in record time, without adequate opportunity for their counsel to even respond to the misrepresentations contained in the Joint Brief of Respondents.

For far lesser transgressions against justice, history recalls that even equally "enlightened" societies such as ours have lost faith in their judicial processes and have run with their muskets to the barricades.

Only this Court can remedy this injustice now.

We humbly ask this Court to grant these Petitioners consideration and the protections afforded by the United States Constitution to which they are entitled, so that

---

15. Respondents' Joint Brief and the ICA Opinion speak merely of a "discovery battle"; not even has there ever been a finding of *any* discovery abuse committed by Petitioners of *any* sort.

they may, however belatedly, have their day in court on the merits of their case.

For the reasons given in this Petition, Petitioners pray that this Petition for Rehearing be granted.

Respectfully submitted,

GARY VICTOR DUBIN
Counsel for Petitioners

Honolulu, Hawaii
December 11, 1987

CERTIFICATE OF GOOD FAITH

I am a member of the Bar of the United States Supreme Court, and I represent the Petitioners in this proceeding.

I hereby certify that this Petition for Rehearing is made and presented to the Court in absolute good faith and in a genuine belief that it is meritorious and complies fully with the requirements of Supreme Court Rule 51, and that it is not submitted for any purposes of delay and is restricted to the required and appropriate grounds for rehearing.

Respectfully submitted,

GARY VICTOR DUBIN
Counsel for Petitioners

Honolulu, Hawaii
December 11, 1987

APPENDIX A

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEON D. RICHARDSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
HOWARD T. LANE, et al.,	)	
	)	
Defendants,	)	CIVIL
	)	NO. 70332
and	)	
	)	
THE FIDELITY STANDARD LIFE INSURANCE COMPANY,	)	
	)	
Intervenor/ Defendant.	)	
	/	

DEPOSITION OF JACK C. LIPMAN

taken at the Offices of Case, Kay and Lynch, 737 Bishop Street, Honolulu, Hawaii, on Monday, November 26, 1984, at 10:A.M., pursuant to Notice.

APPEARANCES:

FOR THE PLAINTIFFS: GARY VICTOR DUBIN

FOR THE DEFENDANT: MICHAEL GIBSON for Howard T. Lane

WESLEY W. ICHIDA
CATHY LEE for defendants Willis Sinsabaugh and Waterfront Properties, Inc.

REPORTED BY:
HAROLD NAKATA, CSR 169
Official Court Reporter
First Circuit Court
State of Hawaii

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* * *

Q Now with respect to to 10 Poipu Place, you have been retained by the plaintiffs to render certain opinions in that case, is that correct?

A That's correct.

Q Have you also been retained to assist in the retention of other experts to give opinions concerning the allegations in the and the complaint in this matter?

A Yes.

Q Can you tell us what you have done in that respect?

A I engaged through my direction only, the assistance of three separate civil engineers to make their own individual investigations and reports of the grading and drainage situation. And—

Q Could you tell us who those three others the three engineers were?

A Russell Smith, the Russel Smith Corporation. Edward Iida of Belt Collins civil engineer, and Brian Gray, civil engineer.

Q And they were all retained to do exactly the

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same thing, is that correct?

A Yes. Not together and relatively unbeknownst to one another at that time.

Q Other than those three engineers were you responsible for retaining the assistance of any other consultants?

A Well, yes. At the present time I have an estimator, construction estimator that I retain.

Q Who would that be?

A Jack Mathews, M-a-t-h-e-w-s.

Q Will he be, so far as you know, testifying in this case?

A I don't know.

Q Has he provided information to you with respect to—

A Not yet.

Q But you do expect to receive information from him?

A Correct.

Q Other than Mr. Mathews and the engineers, who else if anyone had you retained? For instance, I know you have retained someone to do with a scale model for you, I believe?

A Yes. The name of that firm is ASM Architectural Scale Model in—

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Mr. Dubin: I place an objection on the record. You started with, you used the words, retained by Mr. Lipman. Plaintiffs are retaining all consultants

Mr. Gibson: I stand corrected. That is correct. You are not paying for them. You are simply assisting in accumulating these various experts, is that correct?

A That's correct and directing their services.

Q Who else if any are you directing?

A This is not a consultant. This is a contractor whom I called to open up certain areas of the house inside and outside for further inspection and close them up sufficiently enough so inclement weather won't cause additional leaking.

Q Who is that?

A Hidano, H-i-d-a-n-o, Construction, Inc.

Q Have they completed their work?

A Yes, they have.

Q Is there anyone else that we haven't covered at this point?

(Mr. Dubin confers with the deponent.)

A Yes, there was one other I did forget, ESH, Engineers, Surveyors and engineers. They were formally known as William Hee and Associates. And I had them make a survey of the existing grading, elevation conditions at the

Page 18

front of the house as well as the periphery of the house.

Q Have their work been completed?

A Yes.

Q Of the consultants who you just referred to, whose work has not yet been completed?

A ASM the model. The had estimator Jack Mathews. And I think that's all.

Q As you know or may not know, Mr. Norman Lakaya (phonetic) also an architect has provided information in the form of deposition testimony and letters and he may have provided anything else other than those two matters. Have you seen any documents prepared by Mr. Lakaya with respect to this case?

A Yes, I have but I have no idea whether I have seen all the documents or not.

Q Can you describe, well, strike that. Have you had any discussions with Mr. Lakaya concerning this case?

A I had one telephone conversation with him.

Q Could you please tell me about that conversation?

A When I found that he was involved with Mr. Richardson prior to my being retained, I was curious to know to what extent that he was giving services, how far he had gone and so that we could either work together if that were going to be the case or I would know how to pickup

whatever it is he had reviewed thus far.

Q What did he describe to you as the work that he had performed?

A It was that he was hired to come up with conceptual designs or planning for certain remodeling that the

Richardsons wanted in their house done to their house. And which had never gone beyond except actual design.

Q Did you review those conceptual designs?

A Briefly, yes.

Q Did Mr. Lakaya reveal to you his having performed certain services with respect to review of the water infiltration problem allegedly existing at the premises?

Mr. Dubin: I would like to place on the record an objection based upon the hearsay rule.

A My answer to that question is, no.

Q You did not discuss with you his investigation of the water infiltration problem?

A No.

Q Have you seen a copy of his letter or report?

A I have not seen a copy of his report. I have seen a copy of a letter, I think, maybe two, I am not sure. That was some time ago.

Q Did you put any, strike that. Did you rely on in any way on that letter in coming to your opinion

concerning the allegations in this case?

A No.

Mr. Dubin: Excuse me for a second.

(Mr. Dubin confers with the deponent)

A I neglected to mention that I did, we did meet Lakaya at the site one time. But I don't recall what the

full conversation was. I think I don't even know who called him.

Q Do you remember what the purpose of that meeting was, sir?

A No. I know I was there for the purpose of further investigation. But I don't know why he was called out.

Mr. Dubin: For the record, Mike, I asked Lakaya to stop by. He stopped by for couple of minutes. I thought he should take a look at the house again.

Q Now, there is also an individual by the name of Dobrowolski and his report will be sent when it's available?

Mr. Dubin: D-o-b-r-o-w-o-l-s-k-i.

Q Mr. Dobrowolski also prepared a report. Did you have, was Mr. Dobrowolski's report prepared at your request?

A No.

Q Have you had occasion to review it in the

process of your consulting the plaintiffs in this matter?

A Yes.

Q Did you use it in coming up with your conclusion and recommendation?

Mr. Dubin: I object to vagueness of the question.

A No. Except to the extent that he and I met at the site when he was here and did certain inspections and took

certain photographs together. But we didn't discuss any remedial aspects.

Q You have seen his report, though, is that correct?

A That's correct.

Q But I believe it's your testimony that you relied on the people that you were responsible for hiring as consultants rather than Mr. Dobrowolski's report?

Mr. Dubin: I object to the vagueness of the phraseology of this question as to whether he relied and to what extent and what reliance means. I state that on the record to make sure the record is clear.

Q You can answer the question?

A Would you mind repeating it?

Q What, to what extent, if any, did you rely on Mr. Dobrowolski's report or will you rely on it in coming to your conclusion with respect to the problems which may

exist and the cost to repair those problems?

A None.

Q Can you tell me why?

A I just wanted to come up with my own opinion after my, after further investigation which at the time that he and I inspected the site we were not privileged at that time to look inside the walls or inside the ground area because no work had been done to expose the surfaces. Consequently, any decision or opinions that I made would only be put together after I had an opportunity to thoroughly inspect the project.

Q Would that apply though remedial work or to the causes for the problem as well?

A I would say for both.

Q So until you had hired the contractor whose name I forget now to open it up so you could look in, you couldn't in your opinion give an accurate assessment of the cost to repair or the causes for the problems, is that correct?

Mr. Dubin: I object on the record that you used the word accurately as misleading. Experts can give variety of opinions about, based upon information they have subject to changes and they get more information. You used the word accurate and suggestion of any other observation or advice or comments by an expert prior to opening up the

walls would not be accurate. Misstates the role of the expert.

Q I believe your answer was, yes, before Mr. Dubin made his objection. Is it still, yes, after he's made his objection?

A Yes.

Q (By Mr. Gibson) Off the record.

(Discussion off the record.)

(End discussion off the record.).

Q (By Mr. Gibson) Mr. Lipman, a report was prepared Dennis Shin of Sam Hirota, Inc. dated February 4, 1984. Did you rely on or consider this report in your assessment of the claims and remedial work, that you have prepared or will prepare?

A No.

Q Were there any other consultants upon who you have relied to make your final report or your report dated February, excuse me, December 10, 1982?

Mr. Dubin: Just a moment.

(Mr. Dubin confers with the deponent)

A. No, there were none others and I'd also like to clarify the fact that I did not rely on the reports given to me by the consultants that I hired.

Q What did you hire them for?

A To get their interpretation of the situation.

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Mr. Dubin: Once again, make clear on the record that they were hired by the plaintiffs.

Q I understand that the plaintiffs paid for their services but you suggested that they be retained to provide certain assistance to you, is that correct?

A Yes.

Q What kind of assistance were they to provide if it wasn't for purposes of your coming up with your recommendation or your evaluation?

A To see if there was any complete opposition to any of the foregone, not conclusion, but opinions that I had formed.

Q Can you explain that because I don't understand what you mean by that?

A If one of the consultants had come up with a conclusion that was totally in opposition to my thinking, I would have certainly gone into it with him and found out why he had gone and made that decision. What caused him to come up with that answer. Therefore, I would have in part relied on his report. But I am not relying on all these reports fully, otherwise, I feel that my role would have been just the conductor of the arts as opposed to giving professional expertise myself.

Q Did the three engineers provide you with different types of data or were they specifically requested

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by you to perform exactly the same task?

A They were requested to perform the same task.

Q Each one of them?

A Yes, individually.

Q And I believe now we have identified all of the consultants who you relied upon, is that correct?

A That's correct.

Mr. Dubin: Once again, the word relied upon still confuses me. That's what he's saying. Clarify that.

Q Who provided information upon which you based your opinion, whether it was to confirm your opinion or information such as Mr. Mathews which you used in coming to a conclusion?

A That's right.

Mr. Dubin: I would like talk to Jack a second.

(Mr. Dubin confers with the deponent)

A If I may, I would like to back up to this extent. That although I selected the engineers, the engineering consultants to provide this information, it was requested by Mr. Dubin that I get additional engineers to make, to see what their opinions would be relative to the grading situation and the eventual damages that may have been caused by drainage.

Q I don't want to put words in your mouth but is that the reason you had three instead of just one?

Page 26

A That's correct.

* * *

APPENDIX B

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LEON D. RICHARDSON, et al., Plaintiffs, vs. HOWARD T. LANE, et al., Defendants, and THE FIDELITY STANDARD LIFE INSURANCE COMPANY, Intervenor/ Defendant.	CIVIL NO: 70332

DEPOSITION OF NORMAN LACAYO

Taken on Behalf of Defendant Howard T. Lane at 928 Nuuanu Avenue, Honolulu, Hawaii 96813, commencing at 2:10 p.m., on Friday, November 30, 1984, pursuant to Notice.

BEFORE:

D. IWALANI CARR, CSR 111
Notary Public, State of Hawaii

APPEARANCES:

For Plaintiffs: GARY VICTOR DUBIN, ESQ.
Suite 800
345 Queen Street
Honolulu, Hawaii 96813

For Defendant Howard T. Lane:	MICHAEL W. GIBSON, ESQ. Ashford & Wriston 235 Queen Street Honolulu, Hawaii 96813
For Defendants Willis Sinsabaugh and Waterfront Properties, Inc.:	CATHY A. LEE, ESQ. Case, Kay & Lynch 2500 & 2600 Grosvenor Center 737 Bishop Street Honolulu, Hawaii 96813

* * *

Page 11

EXAMINATION

BY MR. GIBSON:

Q. You gave two depositions in October of 1982. Since October of 1982, what, if anything, have you done with respect to investigation of the situation at 10 Poipu Place?

A. Nothing.

Q. Nothing at all?

A. (Witness shakes head from side to side.)

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Q. Have you had discussions with either Mr. Dubin or Mr. Jack Lipman or engineers or others?

A. Nothing that I can think of that was of any significance.

Q. Have you been to 10 Poipu Place?

A. I was there one day, one afternoon. There was nothing that would be an investigative or an inquiring.

Q. Do you recall what the purpose of that visit was?

A. Offhand, I really can't. Exactly, I can't, really, because it was like, "What am I here for?"

Mr. Dubin: Off the record.

(Off the record.)

BY MR. GIBSON:

Q. If you remember, who was there at the time that you were at 10 Poipu Place?

A. Jack Lipman and Gary.

Q. That would be Mr. Dubin. Gary Dubin.

A. Yeah.

Q. Did you provide Mr. Dubin or Mr. Lipman with any documents, either plans, specifications?

A. No.

Q. Nothing such as that?

A. No.

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Q. Did you have occasion to be able to walk around the house and observe the house?

A. No.

Q. So you couldn't tell us today whether it was in the same condition as it was when you were there in October of 1982 or improved or deteriorated?

A. I did no examination of any kind.

Mr. Gibson: Well, in that case, I have no further questions of Mr. Lacayo.

Mr. Dubin: Cathy?

Ms. Lee: I have no questions.

Mr. Dubin: Then for the record, Plaintiffs will state that we intend to provide Mr. Lacayo with the final report of Mr. Lipman and ask Mr. Lacayo to read that final report for purposes of reflecting on that report and his earlier observations when he was on the property a couple years ago. And the reason that Mr. Lacayo was named as an expert is because at the deposition that you took, Mr. Gibson, on two sessions in October, you asked him certain questions that put his opinion on record as an expert, and we wish to follow that line up at the trial, with Mr. Lacayo, if necessary.

Mr. Gibson: Okay.

APPENDIX C

GARY VICTOR DUBIN
Attorney at Law
Suite 1915
Grosvenor Center
733 Bishop Street
Honolulu, Hawaii, 96813

(808) 537-2300

September 17, 1987

Francis J. Lorson, Esq.
Chief Deputy Clerk
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: Leon D. Richardson, et al. vs. Howard T. Lane, et al.; Petition For Writ of Certiorari, Submitted August 17, 1987

Dear Mr. Lorson:

In accordance with your telephone request today, I am resubmitting for filing under separate cover, by first class certified mail, 40 copies of the above Petition, together with 40 copies of the Appendix thereto, and my original office check in the amount of $200.00, which you had earlier returned to me by letter dated August 21, 1987, pursuant to the request that I subsequently made to your office, now granted, to reconsider your decision and permit its filing.

Thank you for your reconsideration of this matter and the opportunity to have docketed our application for a writ of certiorari in this most important case.

Very truly yours,
/s/ Gary Victor Dubin

GVD/o

cc: Clerk, Supreme Court of Hawaii
(Your No. 11353)

Clerk, Intermediate Court of Appeals
(Your No. 11353)

Michael W. Gibson, Esq.
Wesley Ichida, Esq.
Walter Beh II, Esq.

GARY VICTOR DUBIN
Attorney at Law
Suite 1915
Grosvenor Center
733 Bishop Street
Honolulu, Hawaii 96813

(808) 537-2300

September 5, 1987

Express Mail

The Honorable Joseph F. Spaniol, Jr.
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: Leon D. Richardson, et al. vs. Howard T. Lane, et al.; Petition For Writ of Certiiorari, Submitted August 17, 1987

Dear Mr. Spaniol:

Yesterday I received a copy of the enclosed letter from Chief Deputy Clerk Francis J. Lorson, informing me that your office had refused to accept for filing the above-referenced Petition.

I am apparently the last to know of this decision, since that letter was sent with the box containing the returned copies of the Petition, which took several weeks to reach Honolulu by surface mail.

I am writing to request that your office reconsider its decision and accept our Petition for filing, as I respectfully believe that you have made an error and that both under the Rules and the Statute your office is required to docket the Petition, for the reasons which follow.

Title 28, Section 2101(c), as you know, specifies a period of ninety days "after the entry of such judgment or decree". You will note that the judgment of the Hawaii Intermediate Court of Appeals was entered on May 19, 1987, by a document signed by Judge Heen entitled "Judgment on Appeal". The Petition was filed on the ninetieth day following that entry of judgment.

While I very much appreciate that the Court wishes to differentiate between the day of the "rendering" and the day of the "mandate" of judgment, I suppose so as to make uniform [Page Two] the actual time period considering the apparent differences among local practices in the various States, we believe that your office, even with this distinction in mind (which is moreover not statutory), has misapplied Rule 20.

First, the "Judgment on Appeal" entered on May 19, 1987, was *not* the Hawaii court's "mandate", as local procedure provides that the mandate issues in the form of the "Notice of Entry of Judgment". That is the Hawaii practice, and that document was entered by the Hawaii court also on May 19, 1987, as a *separate mandate*, specifically directed to the lower court.

This dual procedure is nothing new. As Stern and Gressman explained in the Fourth Edition of their *Supreme Court Practice:*

> And where under state law a final judgment is not issued or entered until 30 days after rendition of the decision, the time for petitioning for certiorari does not begin to run until that subsequent entry of judgment. Puget Sound P. &. L. Co. v. King County, 264 U.S. 22, 23, 25.

The reasoning for such a local practice in the context of a rehearing and a subsequent application for review in the Hawaii Supreme Court is clear in our facts. The initial opinion of the Hawaii Intermediate Court of Appeals was rendered on April 3, 1987. Local rules provide for entry of the judgment ten days thereafter unless reconsideration is requested or a writ of certiorari to the Hawaii Supreme Court is filed.

In our case, a motion for reconsideration was filed *and granted in part* on April 22, 1987, in favor of these Petitioners; while our application to the Hawaii Supreme Court was denied on May 8, 1987, by notification by mail the following week, another party had filed a motion for reconsideration of the amended order which was not denied until May 5, 1987; local rules provided time for application for a writ of certiorari to the Hawaii Supreme Court from such denial until May 18, 1987, notice having been given by mail which adds two days to the period under state law.

[Page Three] Thus, with all of this going on, as a matter of course, it is easy to understand why the Hawaii courts do not enter judgment until the applicable time periods have fully expired. This is a common practice even in the federal courts, for Rule 36 ("Entry of Judg-

ment") of the Federal Rules of Appellate Procedure for the United States Court of Appeals provides:

> The notation of a judgment in the docket constitutes entry of judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. . . . The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion is written, and notice of the date of entry of the judgment.

That is precisely why, on April 23, 1987, *after* the amended opinion here, counsel for appellee Lane wrote the Hawaii Intermediate Court of Appeals with his version of the judgment to be entered, for settlement:

> Pursuant to Rule 41, Hawaii Rules of Appellate Procedures, we are transmitting herewith another proposed Judgment on Appeal and Notice of Entry of Judgment on Appeal.

Judgment was therefore entered on May 19, 1987, the first possible day under local appellate rules. Rule 36 provides: *The filing of the judgment constitutes entry of judgment.* This issue is determined by *local* rules.

Your lack of understanding of the Hawaii practice may result from a misconception of the two-level appellate structure in our State; the Hawaii I.C.A. functions as a part of the Hawaii Supreme Court. In reality there are not two appellate structures, although review may be had in the Hawaii Supreme Court. The appeal is assigned by the Supreme Court to itself or the I.C.A.; there was

no entry of judgment possible or intended within the Hawaii appellate process until the Hawaii Supreme Court ruled. Its denial of certiorari then triggered the entry of judgment, not as Mr. Lorson's letter mistakenly otherwise assumed. There was no appellate judgment's finality "stayed" by Hawaii Supreme Court [Page Four] review; that review was built into the "assignment" process.

Second, even were your office's interpretation of the first Hawaii Intermediate Court of Appeals' opinion as the "entry of judgment" to be correct, which we dispute, your office in refusing our filing has nevertheless misapplied section 20.4 for that section states that in the event, as here, where a rehearing was granted:

> the time for filing the petition for writ of certiorari for all parties . . . runs from the date . . . of the entry of a subsequent judgment entered on the rehearing.

This section should be controlling; it does not refer to "rendering" but "entry of judgment" which clearly occurred in this case on May 19, 1987. This surely is the clearest of cases illustrating the necessity of counting from the date of actual entry, for the order of the Hawaii Intermediate Court of Appeals amending the first opinion directs the clerk to make the necessary changes in the opinion first.

There was no notice of entry of judgment and no entry of judgment until May 19, 1987. The application to the Hawaii Supreme Court under Hawaii practice comes *before* the entry of judgment in the I.C.A. and not *after* as Mr. Lorson mistakenly believed. Rules 31(e) and 41(b), Hawaii Rules of Appellate Procedure.

The distinction in these circumstances between the date the opinion is rendered and the date of the *entry* of judgment has already been decided by the United States Supreme Court in *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969), in a case involving a federal entry-of-judgment rule identical in effect to that here:

> We are met at the outset with the contention that the petition for certiorari was untimely filed. In civil suits certiorari must be applied for "within ninety days after the entry of [the] judgment or decree" of which review is sought. 28 U.S.C. § 2102(c). In this case an opinion of March 5, 1968, concluded that "upon presentation, an appropriate decree will be entered." A decree was in fact entered on April 16, 1968. The petition for certiorari was docketed here on July 6, 1968, within 90 days of the decree but not of the opinion.

[Page Five] In *Scofield*, the procedural rules were identical to the language of the Hawaii Appellate Rules specifying entry of judgment and notice of entry after the decision:

> In our view, the petition for certiorari was timely filed. Petitioners here received a copy of the March 5 opinion, but were given no notice of any entry of judgment on that date, as would be required by Rule 36 of the new Federal Rules of Appellate Procedure, effective July 1, 1968. Since no notice was given and it could not have been clear to petitioners whether there was a March 5 judgment or not we hold, without abandoning the standard that a "judgment for our purposes is final when the issues are adjudged" and settled with finality, . . . that in this case the relevant date is that of the entry of the decree. Cf. Rubber Co. v. Goodyear, 6 Wall. 153 (1868).

In its most recent decision on this issue which I have found, the United States Supreme Court in *Marquette National Bank of Minnesota v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), held that where, as here, there was a subsequent rehearing, the ninety days runs from the date of the subsequent entry of judgment and not when the rehearing was denied:

> n18. We reject respondent's argument that the petitions are untimely. The opinion of the Minnesota Supreme Court was filed on November 10, 1977. Petitioners filed a timely petition for rehearing, which, under Minnesota law, defers the entry of judgment until after the disposition of the petition. See Minn. Rules Civ. App. Proc. 136.02, 140. The petition for rehearing was denied on December 8, 1977; judgment was entered on December 14, 1977, by way of a separate document stating that "the order and judgment of the Court below, herein appealed from . . . be and the same hereby is in all things reversed." App. H to Pet. for Cert. in No. 77-1265. Petitions for certiorari were filed [Page Six] in this Court on March 13, 1978, within the 90 days "after the entry of such judgment or decree" allotted by 28 U.S.C. § 2101(c). See Puget Sound Power & Light Co. v. King County, 264 U.S. 22, 24-25 (1924); Commissioner v. Estate of Bedford, 325 U.S. 283, 284-288 (1945).

Our facts are even stronger than those in *Marquette*, supporting *timely* filing. Petitioners' motion here for reconsideration was granted and partial reversal was granted, necessitating the ordering of the clerk to amend the original decision. There was no simple denial. Under Hawaii appellate procedures, the entry of judgment was expressly delayed until the Hawaii Supreme Court acted on the application for a second review; when the Hawaii

Supreme Court denied these Petitioners further review there had as yet been *no* entry of the judgment and indeed at that time of denial other parties in the case still had a right to seek review in the Hawaii Supreme Court (until May *18,* 1987).

Once again, this is clearly understood when one understands that in Hawaii the Intermediate Court of Appeals is an appellate arm of the Hawaii Supreme Court; the appellate procedures are integrated. There is no entry of judgment, not even by the Intermediate Court of Appeals, until *after* the decision, in this case, to deny review by the Hawaii Supreme Court; at that point, it is not a matter of simply making final the judgment of the I.C.A. previously entered; there was no previous entry of judgment. While this might seem confusing, it is easily understood when it is understood that the procedures of the two courts and their clerks' offices are integrated, pursuant to a one-appeal-per-case theory, as the Hawaii legislative history makes clear, in HCCR No. 70, Session Laws 1979, at 1123:

> [T]he essence of its establishment is not the construction of an additional layer of appeal. Rather, its [I.C.A.'s] function is to alleviate appellate congestion by relieving the Supreme Court of its appellate load in the more routine and minor decisions in all types of cases.

[Page Seven] We have no quarrel with your obviously well-founded policies to screen out-of-time cases from the Court and also to apparently avoid permitting petitioners to have more than ninety days in which to file through delaying entry of judgment.

It makes no administrative or substantive sense, however, to screen out our case at this juncture. We have relied upon the plain language of the applicable congressional statute and the only precedent of this Court which we have found completely supports our reading. Nor has there been any delay in the entry of the judgment below through some unacceptable "mandate" procedure.

The issues presented in our Petition are, moreover, some of the most *fundamental* concerns embodied within the Fourteenth Amendment. Congress through Section 2101(c), presumably pursuant to its constitutional mandate to implement and enforce the Fourteenth Amendment, has provided for a discretionary appeal if taken within ninety days from "the entry of judgment". There is no ambiguity in that constitutional mandate unless one wants to read it into that clause.

Your Rules of the Supreme Court referring to actual "rendering" are, to the contrary, ambiguous at best, and even your Rules say "entry of judgment" and not "rendering" when, as here, there was a rehearing and a new decision.

On behalf of Petitioners, we respectfully request in the facts of this case that your office permit the filing of our Petition on time and leave any remaining doubts, surely, for a determination by the Court. Indeed, we strongly question any delegation of Supreme Court jurisdictional powers to administrative officers to make such determinations ex parte, without even a hearing, when the protection of Fourteenth Amendment constitutional rights and their vindication are sought, especially in close or arguable circumstances.

There is, at this level, however, no where else to go except to make an application, if necessary, for acceptance of jurisdiction to the Justices of the Court itself.

Hence, I would appreciate your reviewing the contents of this letter and informing me of your decision at the earliest possible opportunity.

[Page Eight] I therefore request an immediate hearing with members of your staff, and I will be prepared to come to Washington, D.C., at once for this purpose, any time after you receive this letter; I will need one day to rearrange my court calendar here and one additional day for flight time.

Further, I will prepare and present, if necessary, an application at that time to the Court for an order docketing the Petition, or, in the alternative, for an order granting an extension of time in which to file the Petition, if your office should not reconsider, and I would very much appreciate your suggestions concerning your preferred procedures for such application in the event that you have worked out such a process for such situations.

Since time is of the essence, I trust that I will hear from you with reasonable speed. While I understand that your Rules suggest, for instance, that applications for extensions of time to file should be made well in advance of the deadline for filing, I believe that in this case it is clear that given the ambiguities in your policies and rules and the plain language of the applicable statute and Hawaii rules, I should have the right to present my case to Justices of the Court, and would therefore also appreciate appropriate appointments with the supervising Jus-

tice for this Circuit and/or his law clerks at the time of my arrival if I am unable to persuade your office to accept the Petition for filing.

You will note that the applicable statute allows a 60-day extension (which would be to October 5th using your method of counting, which we believe is erroneous). Even as to this issue of "jurisdiction", Justices Black and Douglas, at least, had many times remarked that the Court has been inconsistent in its policies and has even on occasion considered Petitions "out-of-time"; see *Deal v. Cincinnati Board of Education*, 402 U.S. 962 (1971). Our Petition is only "out-of-time" if the ambiguities are read against us. We do not believe that that is a proper way to decide constitutional cases of the type we have presented and hope that the Court will share our views.

With all due respect, we believe that the Constitution of the United States and the Laws of the Congress give us the right to have that decision made by the Court and not by the Clerk's Office.

[Page Nine] I have enclosed one copy of the Petition and its Appendix, for your reference (since you sent them back to me) which contains the information referred to herein, and I would be pleased to provide your office with whatever additional documents you might request, with whatever authentication that is desired, although I would think that the complexity of this question at best would itself be grounds for your accepting the Petition for it is unthinkable that Rule 20.3 was designed to grant to your office the discretion to decide in anything but the clearest of customary cases lest you intend to establish a mini-Su-

preme Court in your department to ponder over these questions and issue opinions yourselves.

For example, in our case the decision of the Intermediate Court of Appeals was further changed, by order dated June 16, 1987, only eighty-one days ago (and just sixty-two days before our attempted filing), as follows:

> The court having considered Defendant-Appellee Howard T. Lane's motion for award of costs on appeal of $106.50 and for leave to apply to the circuit court for attorney's fees incurred on appeal filed on May 28, 1987, and Plaintiffs-Appellants' memorandum in opposition, IT IS HEREBY ORDERED that said motion is granted.

This amendment to the I.C.A. decision could cost my clients an additional $50,000 or more. It is no mere cost award, but grants attorneys' fees which are not awardable in appeals in Hawaii; they are awarded here based upon the appellate court's apparent interpretation of the underlying land sale contract, and that itself is a substantive matter first argued on appeal only *after* the first entry of judgment on May 19, 1987. What of its effect? This is precisely the type of factual situation that does not lend itself to administrative "ballparking" by your office.

Thus, with respect to the extraordinary "cost" award, the Hawaii Rules of Appellate Procedure, Rule 39(d), requires that the original entry of judgment be "amended" to provide for the additional relief. How will your office factor in this added State "entry-of-judgment" requirement?

Rule 39(d) reads:

> [Page Ten] The issuance of the judgment and the notice of entry of judgment shall not be delayed for an

> award of costs and fees. If the notice of entry of judgment has been issued before issuance of an order awarding costs and fees, the party favored by such an order shall prepare and submit to the clerk of the Supreme Court [of Hawaii] a proposed amended notice of entry of judgment which shall be processed in the same manner as are original notices under Rule 41, infra.

The amended judgment was delayed due to the contested and substantive nature of the issues and the arguments submitted to the I.C.A.

To my knowledge, no amended judgment was ever submitted to the Hawaii Supreme Court, nor has there as yet been any amended notice sent. The fact that the amended judgment and notice are to be submitted to the Supreme Court of Hawaii in draft form (and not to the Intermediate Court of Appeals) by Rule 39(d) covering both courts, even though the original decision and judgment entered may have been, as here, entered in the Intermediate Court, further shows the integrated nature of both courts with respect to the significance of the denial of certiorari by the Hawaii Supreme Court *before* any judgment had been entered.

I trust that the above amply demonstrates the less than perfect appellate world we live in and the lack of our mortal perfection. In applying "out-of-time" capital punishment remedies, your office under Rule 20.3 should surely discharge a greater burden for providing clearer language and perhaps some examples before decapitating civil parties in the absence of any showing of prejudice or intended or inexcusable neglect.

The decision to file a Petition in your Court has not grown any easier for litigants in recent years; they have not only had to weigh the statistical improbabilities of review, in terms of the sheer numbers of cases; but printing costs and your preparation requirements have made justice increasingly expensive.

These Petitioners have braved the journey to your front door and are more deserving of your extended consideration, [Page Eleven] in their defense of everyone's Fourteenth Amendment constitutional rights, in the most respected deliberative tribunal in the history of the world.

Forgive us if we have thus far experienced some honest disappointment.

The remedies we seek are outlined in chart form on the following page, in terms of whatever and whichever magical dates might apply.

Please keep in mind that the statute makes none of the special distinctions now applied by your office, nor do the Supreme Court's decided cases support any cavalier decision that our Petition was out-of-time; the statute does not even restrict extensions to those requested before-the-fact.

We therefore suggest that the outcome of this is truly within your discretion and ultimately with the Justices, and no one's hands are tied.

It has often and increasingly been said of the American appellate process that with its growing technicalities with respect to appeals it has become full of traps for the unwary and angles for the shrewd.

We sincerely pray that your office will reconsider its prior letter opinion so that justice may be done in this case.

Very truly yours,

/s/ Gary Dubin
Gary Victor Dubin

GVD/o
enclosures

cc: Clerk, Supreme Court of Hawaii
(Your No. 11353)

Clerk, Intermediate Court of Appeals
(Your No. 11353)

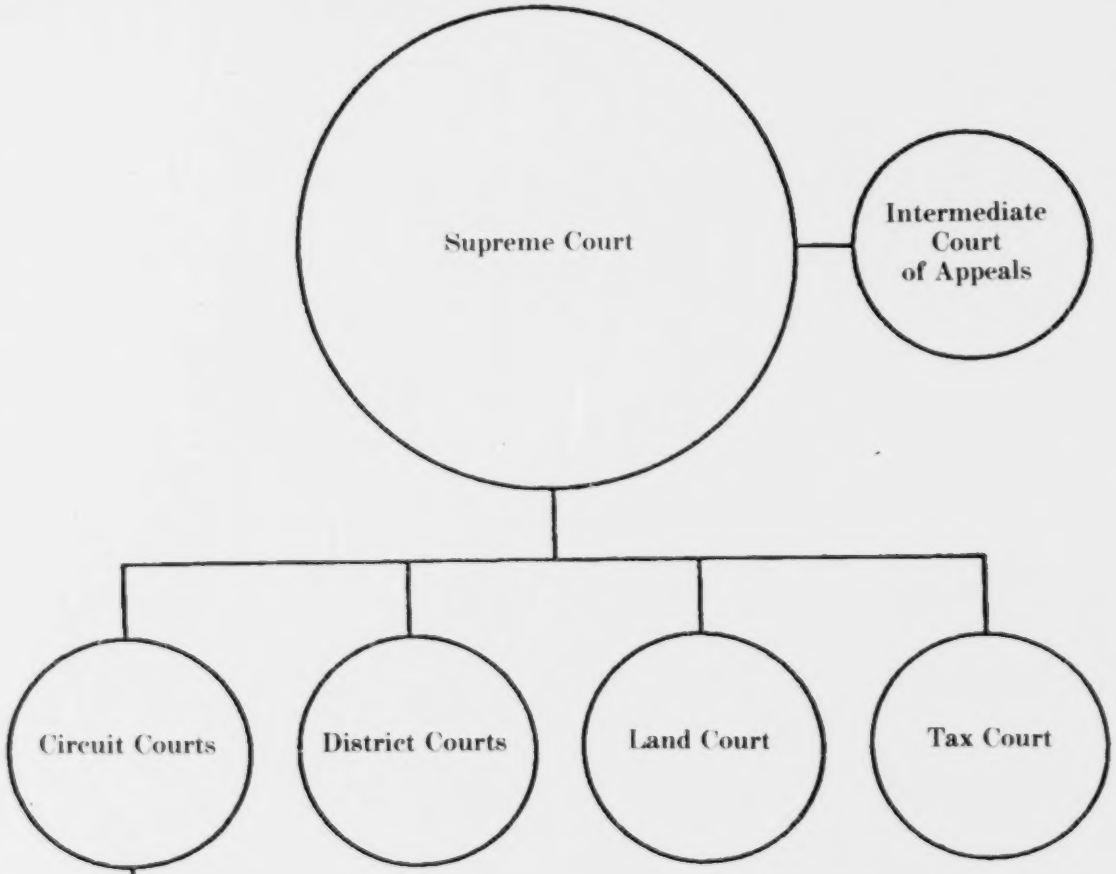
Michael W. Gibson, Esq.
Wesley Ichida, Esq.
Walter Beh II, Esq.

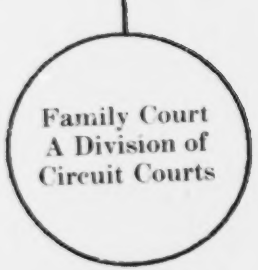
Francis J. Lorson
Chief Deputy Clerk
United States Supreme Court

ALTERNATIVE TIME PERIOD ANALYSES FOR FILING OF PETITION

FIRST STARTING DATE	CERT PERIOD EXPIRES	IS RULE 20 SATISFIED?
May 8, 1987 Date Hawaii Supreme Court denied review of I.C.A. decision; at that time no judgment had been entered as Hawaii Supreme Court & I.C.A. share comon appeal process and structure; goes back to I.C.A. for entry of judgment for first time.	August 17, 1987 Date judgment first entered by I.C.A. 5/19/87, after a denial of review by Hawaii Supreme Court; Hawaii App. Rule 36 requires filing of judgment as entry of judgment, not before and not opinion; amended judgment required actual entry.	YES S 2101(c) says only entry of judgment; Rule 20 says rendering but if reconsidered, Rule 20 specifies entry also; mandate separate under Hawaii law and was not issued also until 5/19; 90 days from judgment entry was 8/17/87 as filed.
SECOND STARTING DATE	**CERT PERIOD EXPIRES**	**IS RULE 20 SATISFIED?**
May 18, 1987 Date other parties' right to seek Hawaii Supreme Court review expired; local rules give right to party and clerk withholds entry of judgment until then as a matter of course; review by Hawaii Supreme Court is in effect a rehearing.	August 17, 1987 Date judgment first entered by I.C.A. 5/19/87, after a denial of review by Hawaii Supreme Court and other parties did not seek further review, plus 2 days after 5/15/87 (mail rule + Sat. rule); earliest date 8/17/87 since 8/16/87 a Sunday.	YES Hawaii App. Rule 36 governs when judgment entered under state law; time of filing of judgment 5/19/87. Clerk could have filed no earlier than 5/18/87, waiting ten days for last review right to expire; even then 8/17/87 would have been timely.
THIRD STARTING DATE	**CERT PERIOD EXPIRES**	**IS RULE 20 SATISFIED?**
May 19, 1987 Date of entry of judgment (filed under rule 36), not date of mandate only; clerk had proposed draft of judgment for ten days and waited until all further state review periods for all parties expired before filing judgment.	August 17, 1987 Date judgment first entered by I.C.A. 5/19/87, after a denial of review by Hawaii Supreme Court; even Rule 20.4 states that due to the amended decision the period does not run until the entry of judgment; all decided U.S. Sup. Ct. cases agree.	YES 5/19/87 was date of entry of judgment in addition to entry of mandate by separate document; Rule 36 of Hawaii Appellate Rules requires filing of judgment as entry. Petition filed 8/17/87 in time. all U.S. Sup. Ct. cases on this point agree.
FOURTH STARTING DATE	**CERT PERIOD EXPIRES**	**IS RULE 20 SATISFIED?**
June 16, 1987 I.C.A. decision further amended after entry of first judgment on 6/16/87, to include extensive costs and fees; Hawaii App. Rule 39(d) requires new amended judgment and entry and notice (not yet prepared or filed). Significantly changed result.	September 14, 1987 If 6/16/87 order considered new entry of judgment under "rendering" theory, then the 90 days would expire 9/14/87 and even later if Hawaii App. Rule 36 obeyed requiring an entry of judgment by filing. Motion to add to judgment was in effect rehearing.	YES If 6/16/87 order amending judgment started clock for Petition again, 8/17/87 filing in time; if considered necessary to recite new order, clerk's office should add this letter as supplement to original filing and accept for filing by 9/14/87.

Hawaii's Judicial Organizational Chart





Hawaii's judicial system is organized into two levels. The appellate level consists of the Supreme Court and the Intermediate Court of Appeals (ICA). The trial level consists of the Circuit Courts, the Family Courts (a division of the Circuit Courts), the District Courts, and two specialized courts: the Land Court, which deals primarily with registration of title for fee simple land and easements; the Tax Appeal Court, which handles disputes between the tax assessor and taxpayer. Direct lines of appeal extend to the Supreme Court from all trial level courts. An assignment judge, appointed by the Chief Justice from among those who sit on the Supreme Court and the ICA bench, decides whether the Supreme Court or the ICA will review an appeal.

The Circuit Courts are courts of general jurisdiction in civil and criminal matters. Circuit Courts have exclusive jurisdiction in criminal felony cases, probate and guardianship cases, and civil cases involving sums of more than $5,000. All jury trials are held in Circuit Courts. The Family Courts, established to deal exclusively with children and families, form a separate divison of the Circuit Courts.

The District Courts are non-jury trial courts with limited jurisdiction in civil and criminal matters. District Courts have exclusive jurisdiction in petty and criminal misdemeanors, traffic violations, and normally, civil cases involving sums of less than $1,000.

Circuit and District Courts share concurrent jurisdiction in civil matters where the contested amount is less than $5,000.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

August 21, 1987

Gary Victor Dubin, Esquire
Suite 1915
733 Bishop Street
Honolulu, HI 96813

Re: Leon D. Richardson and Margies J. Richardson and Copthorne, *N.V. v. Howard T. Lane, et al.*

Dear Mr. Dubin:

Your petition for writ of certiorari and appendix thereto mailed from Honolulu, on August 17, 1987 were delivered to this office on August 20, 1987, and are returned as out-of-time.

The time to file this petition for writ of certiorari began to run May 8, 1987, when the Supreme Court of Hawaii denied your application for writ of certiorari. Time does not run from the subsequent entry of mandate. See Rule 20 of the Rules of the Supreme Court.

Since time to file this petition began to run on May 8th the time to file this petition expired on August 6, 1987. See 28 U.S.C. § 2101(c). Once the time to file a petition in a civil matter has expired, the Clerk is directed by the Rules of the Supreme Court to refuse to file the petition. See Rule 20.3.

Also enclosed is your check in the amount of $200.00.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

vjr
Enc.

cc: Clerk Supreme Court of Hawaii
(Your No. 11353)
Clerk, Intermediate Court of Appeals of Hawaii
(Your No. 22353)
Michael W. Gibson, Esq.
Wesley Ichida, Esq.
Walter Beh, II, Esq.

HAWAII RULES OF APPELLATE PROCEDURE

* * *

Rule 36. ENTRY OF JUDGMENT.
The filing of the judgment constitutes entry of judgment.

* * *

GARY VICTOR DUBIN
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Honolulu, Hawaii 96813

(808) 537-2300

September 7, 1987

Express Mail

The Honorable Joseph F. Spaniol, Jr.
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: Leon D. Richardson, et al. vs. Howard T. Lane, et al.; Petition For Writ of Certiorari, Submitted August 17, 1987

Dear Mr. Spaniol:

Further to my letter to you of September 5, 1987, requesting a reconsideration of your decision to refuse to file and docket the above-referenced Petition, I am writing to bring one relevant point into perhaps sharper focus than may have been evident in my prior, necessarily lengthy letter.

The rehearing in the Intermediate Court resulted in an amendment to the earlier opinion being granted to us on April 22, 1987; pursuant to local appellate rule 36, that was not an "entry of judgment" as that Hawaii rule specifically requires a filing of the judgment as constituting such entry.

The reasons for such a short delayed procedure are obvious, considering the fact that other parties still had up to May 18, 1987, under the local rules, to have sought additional review in the Hawaii Supreme Court; such ten-day delay permits the appellate process to withhold judg-

ment until a second in effect rehearing is considered under the unique Hawaii appellate structure.

The independent issue of a "mandate" to the lower court should not be confused with the requirement under Hawaii law that the local court must file the judgment before it is considered entered, as the local rules also provide for a subsequent "mandate" to the lower court in the form of a [Page Two] "notice of entry of judgment" which was also done thereafter, which is addressed as a mandate to the lower court.

As you know, the judgment of the Intermediate Court was entered promptly on May 19, 1987, based upon the draft submitted to it by counsel as required for settling the judgment.

Applying the clear language of the Court in the *Schofield* and *Marquette* decisions cited in my prior letter, and also the clear language of the second sentence of your Rule 20.4 which, contrary to the first sentence of your Rule 20.4, refers to "entry of judgment" after rehearing and not to its "rendering", had there been, paradoxically, no further request made to the Hawaii Supreme Court for review, I assume that your office under those clear precedents would have permitted the filing of our Petition mailed to you on August 17, 1987, as on time to be consistent with the language of your rules, our appellate rule 36, and your Court's published opinions.

My further re-reading of Mr. Lorson's letter to me of August 21, 1987, suggests that the denial by the Hawaii Supreme Court on May 8, 1987, is the single operative factor in your judgment refusing filing.

While I can well understand your thinking, applying the traditional model of an intermediate court and a higher state court, such as with your circuit courts and the Supreme Court, suggesting that the intermediate court made its decision which must then be considered the judgment in order to permit an application for a writ of certiorari to be then filed therein, with any denial then affirming the intermediate judgment and whatever is then entered being only a mandate to the lower court, that model is *not* the reality in our State of Hawaii.

As I have explained in my prior letter, our Intermediate Court is not really a separate court at all but is a part of our Supreme Court structure and process, as depicted on the official diagram enclosed in my earlier letter to you.

The following are the key distinctions explaining why the short ten-day procedure to seek review in the Hawaii Supreme Court *before* a judgment is entered in the Intermediate Court is unique to our State and does not yield to the traditional analysis applied to our facts by your office:

[Page Three] 1. Our appeal was not originally or ever filed in the Intermediate Court. Pursuant to Hawaii appellate rules, *all* appeals must be filed in the Hawaii Supreme Court which then decides whether it will hear the case or it will initially be heard by the Intermediate Court.

2. The case number assigned to the appeal by the clerk of the Hawaii Supreme Court is the same number that is used for all purposes in both the Intermediate Court and the Hawaii Supreme Court thereafter, notwithstanding the typographical error in the numbering found at the conclusion of Mr. Lorson's August 21st letter to me, no matter

which court or courts may subsequently review the case for consideration or decision.

3. The Intermediate Court has no separate filing procedure or filing office; all documents in the appeal process are filed at the office of the clerk of the Hawaii Supreme Court even if and after the case is assigned out to the Intermediate Court.

4. The procedure for seeking a review within the Hawaii Supreme Court of any Intermediate Court decision before judgment is entered by the Intermediate Court is a *reconsideration* process within the court to which the appeal was first filed (the Hawaii Supreme Court), notwithstanding its "writ of certiorari" nomenclature; your refusal to accept the nomenclature of "entry of judgment" at face value despite its presence in Congressional statutes as in Section 2101(c) should at least suggest a like approach to the "writ of certiorari" verbiage if equal standards are important; the time period is the traditional reconsiderational ten days, and if review is granted by the Hawaii Supreme Court it makes its decision on the existing appellate record and the existing briefs that were submitted to the Intermediate Court.

5. No oral argument as a rule is even granted in such reconsiderational situations by the Hawaii Supreme Court. No new briefs are filed with the Hawaii Supreme Court, which merely reconsiders the appellate materials that were before the Intermediate Court even if it does rehear the case.

6. The clerk's office withholds the entry of any judgment until the "rehearing" by the Hawaii Supreme Court is determined and is announced. There is no judgment of

the Intermediate Court entered, intentionally under rule 36, even though the case is forwarded to the Hawaii Supreme Court for inspection.

[Page Four] 7. This is a very small State in size and in pattern of population distribution as you may know. The judges of the Intermediate Court and the Hawaii Supreme Court work within a few hundred feet of one another. The clerk's offices of the two are effectively combined, with the clerks of each often stamping in the documents of the other. The major trial courts of the State in volume and size are within two blocks of the appellate courts. No elaborate procedures for formalizing the interrelatedness of the various courts over Mainland distances are necessary, which allows the Hawaii Supreme Court with its intermediate arm to itself "rehear" any intermediate decisions it wants to before judgment is permitted to be entered by our appellate rule 36. That seems like an intelligent procedure for us, without ever having been intended surely to trigger an adverse Rule 20 filing refusal by your office of our Petition through your application of a model of the appellate process that is *not* ours.

When I calendared in good faith the filing of our Petition for August 17, 1987, within ninety days of the actual entry of judgment by the Intermediate Court, due to the residency of my individual clients being Hong Kong and the trustees of my corporate client also being outside the United States and not readily available for joint decision making, I did so with a clear understanding that the judgment from which we seek your Court's review was entered as a matter of State law on May 19, 1987, by law *after* the denial of review by the Hawaii Supreme Court in our *single* state appeal known as Case No. 11353.

The filing of our Petition means a great deal to my clients and to me, and be believe to the vitality of the Fourteenth Amendment in our circumstances.

I would appreciate an immediate personal appointment with you and/or members of your office staff to solicit your reconsideration, and the opportunity if unsuccessful to apply to the Court directly for relief.

Since any further delay will be highly prejudicial, I hope that your office will communicate with me by telephone or fax so that I can make all necessary plans to be in Washington, D.C., within a few days.

[Page Five] Given the plain language of Section 2101(c), the clear precedents in your Court's prior decisions cited, the unique nature of the Hawaii appellate process, the ambiguity of your rules, and the obvious violations of the Fourteenth Amendment as explained within the body of our Petition, since we filed same within ninety days of what our State denotes as its entry of judgment, any extended consideration given to this request for reconsideration will be greatly appreciated.

I await word from you.

Very truly yours,

/s/ Gary Victor Dubin

GVD/o

cc: Michael W. Gibson, Esq.
Wesley Ichida, Esq.
Walter Beh II, Esq.
Francis J. Lorson, Esq.

GARY VICTOR DUBIN
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(808) 537-2300

September 8, 1987

Express Mail

The Honorable Joseph F. Spaniol, Jr.
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: Leon D. Richardson, et al. vs. Howard T. Lane, et al., Petition For Writ of Certiorari, Submitted August 17, 1987

Dear Mr. Spaniol:

After sending you, yesterday, my letter of September 7, 1987, in further support of my request for reconsideration of your denial of the filing of our Petition, I have found a decision of the Hawaii Supreme Court explaining our local practice which I wish to call to your attention, which I believe clearly makes a reversal of your refusal mandatory.

Again, attempting to place this matter in proper perspective, the starting point for any analysis must be Section 2101(c) of Title 28 which starts the running of the ninety days from "the entry of judgment".

Apparently, the time-period problem began because various courts, including your district and your circuit

courts, permitted their clerks to "enter" notations of judgments in the record of the cases at various stages of the proceedings and based upon their own differing practices. Your appellate federal rule, Rule 36, for instance, fostered that ambiguity, which of course made your administration of Section 2101(c) understandably difficult.

In an effort it seems to standardize the practice and avoid having Petitions come in ninety days after some clerk made some notation in the record that might later be cited as an "entry of judgment", your Court through Rule 20 has sought to distinguish between the time that the judgment became effective and the time that the clerk of that court [Page Two] might make a "notation" in the record which had merely what you now term the "mandate effect", serving notice to the lower court of the judgment taken above.

That distinction begins your Rule 20.4, although with respect to a judgment upon rehearing (our situation) your Rule 20.4 still speaks in terms of an entry of judgment.

Surely, however, by drawing that distinction you do not intend to *change* state law and make a decision of a state court an "entry of judgment" with all the finality and effect that that might bring with respect to private rights within that state; it is assumed that your Rule is operating only with respect to the ambiguities.

For example, in "theoretically" the clearest of cases, is your office prepared to interpret Section 2101(c) to consider a state court "decision" an "entry of judgment" where that state specifically has ruled that it is not?

Consider our situation in Hawaii. Our civil rule 58 and our appellate rule 36 differ from the federal rules

even though we borrowed the bulk of those rules from the federal system. With respect to what is "the entry of judgment", Hawaii refused to adopt the federal ambiguity and instead specified that in both rule situations the entry of judgment is and only is "the filing of the judgment" by the clerk.

In Hawaii, we have *no ambiguity* as to "entry of judgment" and your office need not elect for us; there is *no* entry of judgment until the judgment *is filed*. Period. That is the choice of our Legislature and of our Supreme Court. Before the filing of the judgment in Hawaii, there is *no* action by a court of this state which in legal effect constitutes a judgment; as you know, without an adverse judgment there is nothing to appeal and any appeal would be and is ruled in those circumstances premature.

The Hawaii Supreme Court confronted this very question in 1961 in *Marn v. Reynolds*, 44 Haw. 655, 657-658. In *Marn*, the appellant tried to argue under the entry-of-judgment language of Rule 58 (identical to Appellate Rule 36) that a docket entry of the clerk made after the judgment was filed was "the *entry* of judgment" from which the time period began. The Hawaii Supreme Court rejected that argument (along the line of reasoning somewhat similar to your "mandate effect") and definitively ruled that in Hawaii there is *no effective* [Page Three] *judgment* until such time as one is *filed* and that it is only at that point and that point only that the time period begins to run:

> Such contention . . . is without merit, for Rule 58 of the Hawaii Rules of Civil Procedure, unlike the Federal Rules in this respect [identically to appellate

> rule 36 in both jurisdictions as well], provides *in haec verba:* "The filing of the judgment in the office of the clerk constitutes the entry of judgment; * * *." The language is crystal-clear. . . . Pointing, nevertheless, to the existing variance between the Hawaii Rules and the Federal Rules as to what constitutes "entry of judgment," counsel insists that this court "act now to amend Rule 58 by judicial decision." Suffice it to say that we will not ignore the clear language of Rule 58 . . . . This court recognizes that the Hawaii Rules of Civil Procedure were patterned after the Federal Rules. Certain changes, however, were advisedly made to harmonize with local practice of long standing. One of them was to define "entry of judgment" in the language above quoted.

Is it the intention of your office to override the decision of our Legislature and our State Supreme Court as to when our judgments are entered and effective? While obviously any interpretation of Section 2101(c) is a federal question, the issue as to when Hawaii judgments of trial courts and appellate courts are final is not a federal question; it is one that has already been answered by the sovereign powers within our State.

With respect to the question of the timing-relationship between a denial of review in our State Supreme Court of an Intermediate Court decision and the filing of the judgment of the Intermediate Court thereafter, that is also a question of State law which I have explained in my letter to you of September 7, 1987—that is also a *unique* Hawaii practice that differs completely from the multi-layered traditional court system model you are applying to us.

[Page Four] The *only* judgment in our case filed on appeal was filed on May 19, 1987.

We filed our Petition (by mail) on August 17, 1987, within ninety days of the entry of judgment under Hawaii law, which was the filing of the judgment and *not* the mandate under Hawaii law which came thereafter.

Surely, if there are any genuine issues as to the timeliness of our Petition in these circumstances, which we dispute with good cause, they should be decided by your Court and not by your office.

We respectfully request that you reconsider and accept for docketing as of August 17, 1987, our Petition and our Appendix thereto.

Very truly yours,

/s/ Gary Dubin
Gary Victor Dubin

GVD/o

cc: Michael W. Gibson, Esq.
Wesley Ichida, Esq.
Walter Beh II, Esq.
Francis J. Lorson, Esq.

GARY VICTOR DUBIN
Attorney at Law

Suite 1915
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733 Bishop Street
HONOLULU, HAWAII 96813

---

(808) 537-2300
September 8, 1987

Express Mail

The Honorable Joseph F. Spaniol, Jr.
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

RE: Leon D. Richardson, et al. vs. Howard T. Lane, et al., Petition For Writ of Certiorari, Submitted August 17, 1987

Dear Mr. Spaniol:

Earlier today I wrote to you to call your attention to the decision of the Hawaii Supreme Court in *Marn v. Reynolds*, 44 Haw. 655, 657-658 (1961), which held that no judgments in Hawaii pursuant to our State's laws are effective and start the appeal clock until they are *filed* and that that constitutes "entry of judgment", not their rendering and not their notation on the docket sheet and not any subsequent notice or mandate procedure—as a matter of state law, that issue not being a federal question.

One might therefore perhaps ask: What is the status of an announced appellate opinion or order in the State of Hawaii *before* the filing of the judgment? That question is paramount since your office started the appeal clock on us *before* there was a filed judgment in our case.

The answer to this question is that *before* the filing of the judgment on appeal (which in our case occurred on May 19, 1987) there is *no* operative conclusion to the pending appeal as a matter of state law.

One need only consult the appellate record initially of our specific case for proof of this fact:

In 1985 we filed our first appeal, which the Hawaii Supreme Court assigned to the Intermediate Court. The trial judge had inadvertently neglected to formally dismiss cross-claims between the victorious defendants although he had [Page Two] done so orally when his opinion was rendered in open court in January 1985.

In late 1985, the Intermediate Court dismissed the first appeal on the grounds that the judgments of the lower court appealed from were not final, in its Memorandum Opinion entered on December 31, 1985; it refused to reconsider its decision and issued an order denying reconsideration entered January 17, 1986.

The defendants then dismissed their cross-claims formally, as they were also interested in resolving the appellate issues, and we filed new notices of appeal; when the case to our knowledge was to be redocketed for the second appeal in the Hawaii Supreme Court, its Chief Clerk informed us that the first appeal was still pending since the (first) judgment on appeal had never been submitted by the defendants-appellees in draft form and was therefore never filed and that, in order not to have to go through the notice-of-appeal process again, all counsel consented to the entry of a judgment on appeal *nunc pro tunc*, effective January 17, 1986 (the date provided by the Chief Clerk, which was then accomplished).

In order to make the judgment on appeal retroactive, the consenting signatures of all counsel were required, an unusual procedure for the entry of judgments on appeal in Hawaii.

The papers documenting this incident are enclosed.

Thus, one can see that without a *filed* judgment on appeal there is no operative decision on appeal in Hawaii. How then can you begin the appeal clock *beforehand* with respect to the ninety-day period from the entry of judgment when under state law the appeal was not determined until May 19, 1987? And Section 2101(c) requires "entry of judgment".

Neither should your office be further confused by the in-house reconsiderational process utilized uniquely by the Hawaii Supreme Court to review I.C.A. opinions on cases filed in the Hawaii Supreme Court which that Court has assigned to the I.C.A. for hearing, as explained in my prior letters, before as here any operative judgment was reached and made by *filing*.

Had the Hawaii Supreme Court decided to "rehear" our case, notwithstanding the "writ of certiorari" nomenclature, it would have done so in the style of any rehearing generally, in that *same* appellate case with the *same* case number even, [Page Three] *without* new briefs, *without* new oral argument, and *without* any additional record other than upon the Intermediate Court appellate record made before such "rehearing".

I hope that this further information, if anything further is needed, will persuade you to permit our appeal to be filed on August 17, 1987, *nunc pro tunc*, so that it can be decided by your Court on its merits.

I look forward to hearing from you as quickly as possible. I am prepared to provide you immediately with whatever additional authenticated materials you may re-

quire, and I would very much appreciate a personal meeting with you and/or your staff in Washington, D.C., as to these matters, as quickly as such arrangements can be made.

Alternatively, I would like to move the Court for an order permitting the filing or for an appropriate extension in which to do so.

Very truly yours,

/s/ Gary Dubin
Gary Victor Dubin

GVD/o
enclosures

cc: Michael W. Gibson, Esq.
Wesley Ichida, Esq.
Walter Beh II, Esq.
Francis J. Lorson, Esq.
(w/enclosures)

ASHFORD & WRISTON
Attorneys at Law
P.O. Box 131
Honolulu, Hawaii 96810

July 1, 1986

HAND-DELIVERY
Mr. Samuel Makekau
Chief Clerk, Supreme Court
State of Hawaii
Judiciary Building
Honolulu, Hawaii 96813

RE: Case No. 10487, Leon D. Richardson, et al., Plaintiffs-Appellants v. Howard T. Lane, et al., Defendants-Appellees

Dear Mr. Makekau:

Enclosed please find the Judgment on Appeal and the Notice of Entry of Judgment on Appeal and Certificate of Service which we are resubmitting in the above-captioned case. The parties have reviewed the forms and have indicated that they have no objection to the *nunc pro tunc* effect of the Judgment.

If you have any questions regarding this matter, please do not hesitate to contact the undersigned at your convenience.

Very truly yours,

ASHFORD & WRISTON

By /s/ Lorrin B. Hirano

LBH:mb
Enclosure

cc: Gary V. Dubin, Esq.
Cathy A. Lee, Esq.
Cheryl Nakamura, Esq.

4325s

NO. 10487

IN THE INTERMEDIATE COURT OF APPEALS
STATE OF HAWAII

OCTOBER TERM 1985

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a a Netherland Antilles corporation,	) CIVIL NO. 70332)) (Filed July 8, 1986))) APPEAL FROM THE:
Plaintiffs-Appellants,	) 1) ORDER GRANTING) IN PART AND DENYING) IN PART, DEFEN-) DANT'S MOTION TO) DISMISS AND FOR
v.	) SANCTIONS FILED) JANUARY 28, 1985,
HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC, a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DO ENTITIES 31-40,	) 2) ORDER DISMISSING) COMPLAINT FILED) JANUARY 25, 1985,) 3) JUDGMENT FILED) JANUARY 24, 1985,) 4) JUDGMENT FILED) JANUARY 24, 1985,) 5) FINDS OF FACT) AND CONCLUSIONS) OF LAW FILED) JANUARY 24, 1985,
Defendants-Appellees,	) 6) ORDER GRANTING) MOTION FOR ORDER
and	) TO DEPOSIT PAY-) MENTS INTO THE
THE FIDELITY STANDARD LIFE INSURANCE COMPANY,	) COURT FILED) JANUARY 14, 1985,) 7) ORDER MODIFYING
Intervenor/ Defendant.	) AND AMENDING) ORDER TO DEPOSIT) PAYMENT INTO THE
----------	) COURT FILED

JANUARY 28, 1985,
8) ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM ORDER DISMISSING COMPLAINT AND FROM JUDGMENT FOR DEFENDANTS, FOR NEW TRIAL, AND FOR STAY OF JUDGMENT FILED FEBRUARY 26, 1985,
9) ORDER GRANTING DEFENDANT HOWARD T. LANE'S MOTION FOR AWARD OF ATTORNEY'S FEES FILED MARCH 6, 1985,
10) ORDER GRANTING DEFENDANTS WILLIS SINSABAUGH AND WATERFRONT PROPERTIES, INC.'S MOTION FOR COSTS AND ATTORNEY'S FEES FILED MARCH 19, 1985,
11) ORDER DENYING PLAINTIFFS' MOTION FOR ORDER VACATING AND SETTING ASIDE DEFAULT JUDGMENT, ORDER DISMISSING COMPLAINT, AND EXPERT WITNESS PRECLUSION ORDER FILED MARCH 19, 1985 and 12) RULING

REFUSING TO DISQUALIFY JUDGE EDWIN Y. SASAKI PURSUANT TO SECTION 601-7(b) AFFIDAVIT, FROM ALL PROCEEDINGS HEREIN, DECIDED JANUARY 21, 1985, BY JUDGE SASAKI

FIRST CIRCUIT COURT

HONORABLE EDWIN Y. SASAKI Judge

HONORABLE PHILIP T. CHUN Judge

JUDGMENT ON APPEAL

Of Counsel:

ASHFORD & WRISTON

MICHAEL W. GIBSON
LORRIN B. HIRANO
235 Queen Street
P. O. Box 131
Honolulu, Hawaii 96810
Tel. No. 524-4787

Attorneys for Defendants- Appellees
Howard T. Lane, Willis Sinsabaugh
and Waterfront Properties, Inc.

4112s

NO. 10487

IN THE INTERMEDIATE COURT OF APPEALS
STATE OF HAWAII

OCTOBER TERM 1985

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilees corporation,	CIVIL NO. 70332
Plaintiffs-Appellants, v.	JUDGMENT ON APPEAL
HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,	
Defendants-Appellees,	
and	
THE FIDELITY STANDARD LIFE INSURANCE COMPANY,	
Intervenor/ Defendant.	

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Intermediate Court of Appeals entered herein on December 31, 1985, and the Order Denying January 10, 1986 Motion

for Reconsideration entered herein on January 17, 1986, the Appeal is dismissed for lack of appellate jurisdiction.

This Judgment shall be effective as of January 17, 1986.

DATED: Honolulu, Hawaii; July 8, 1986.

BY THE COURT:

/s/ Darrell M. Phillips
Of Clerk

APPROVED:

/s/ James S. Burns
Chief Judge

NO OBJECTION:

/s/ Gary Victor Dubin
Attorney for Plaintiffs

/s/ Cathy A. Lee
Attorney for Defendants
Willis Sinsabaugh and Waterfront
Properties, Inc.

/s/ Cheryl Nakamura
Attorney for Intervenor-Defendant
The Fidelity Standard Life Insurance
Company

4112s

NO. 10487

IN THE INTERMEDIATE COURT OF APPEALS
STATE OF HAWAII

OCTOBER TERM 1985

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilles corporation,	CIVIL NO. 70332
	(Filed July 8, 1986)
Plaintiffs-Appellants,	APPEAL FROM THE: 1) ORDER GRANTING IN PART AND DENYING IN PART, DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS FILED JANUARY 28, 1985, 2) ORDER DISMISSING COMPLAINT FILED JANUARY 25, 1985, 3) JUDGMENT FILED JANUARY 24, 1985 4) JUDGMENT FILED JANUARY 24, 1985 5) FINDS OF FACT AND CONCLUSIONS OF LAW FILED JANUARY 24, 1985 6) ORDER GRANTING MOTION FOR ORDER TO DEPOSIT PAYMENTS INTO THE COURT FILED JANUARY 14, 1985 7) ORDER MODIFYING AND AMENDING ORDER TO DEPOSIT PAYMENT INTO THE COURT FILED JANUARY 28, 1985,
v.	
HOWARD T. LANE WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,	
Defendants-Appellees,	
and	
THE FIDELITY STANDARD LIFE INSURANCE COMPANY,	
Intervenor/ Defendant.	

8) ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM ORDER DISMISSING COMPLAINT AND FROM JUDGMENT FOR DEFENDANTS, FOR NEW TRIAL, AND FOR STAY OF JUDGMENT FILED FEBRUARY 26, 1985,
9) ORDER GRANTING DEFENDANT HOWARD T. LANE'S MOTION FOR AWARD OF ATTORNEY'S FEES FILED MARCH 6, 1985,
10) ORDER GRANTING DEFENDANTS WILLIS SINSABAUGH AND WATERFRONT PROPERTIES, INC.'S MOTION FOR COSTS AND ATTORNEY'S FEES FILED MARCH 19, 1985,
11) ORDER DENYING PLAINTIFFS' MOTION FOR ORDER VACATING AND SETTING ASIDE DEFAULT JUDGMENT, ORDER DISMISSING COMPLAINT AND EXPERT WITNESS PRECLUSION ORDER FILED MARCH 19, 1985 and
12) RULING REFUSING TO DISQUALIFY JUDGE EDWIN Y. SASAKI PURSUANT TO SECTION 601-7(b) AFFIDAVIT, FROM ALL PROCEED-

INGS HEREIN, DECIDED JANUARY 21, 1985, BY JUDGE SASAKI

FIRST CIRCUIT COURT

HONORABLE EDWIN Y. SASAKI Judge

HONORABLE PHILIP T. CHUN Judge

NOTICE OF ENTRY OF JUDGMENT ON APPEAL

CERTIFICATE OF SERVICE

Of Counsel:

ASHFORD & WRISTON

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Tel. No. 524-4787

Attorneys for Defendants-Appellees
Howard T. Lane, Willis Sinsabaugh
and Waterfront Properties, Inc.

4112s

NO. 10487

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

OCTOBER TERM 1985

LEON D. RICHARDSON and MARGIE J. RICHARDSON, husband and wife, and COPTHORNE N.V., a Netherland Antilees corporation,	CIVIL NO. 70332
Plaintiffs-Appellants,	NOTICE OF ENTRY OF JUDGMENT ON APPEAL AND CERTIFICATE OF SERVICE
v.	
HOWARD T. LANE, WILLIS SINSABAUGH, WATERFRONT PROPERTIES, INC., a Hawaii corporation, JOHN DOES 1-10, DOE PARTNERSHIPS 11-20, DOE CORPORATIONS 21-30, and DOE ENTITIES 31-40,	
Defendants-Appellees,	
and	
THE FIDELITY STANDARD LIFE INSURANCE COMPANY, Intervenor/ Defendant.	

NOTICE OF ENTRY OF JUDGMENT ON APPEAL

TO: THE HONORABLE PRESIDING JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII;

PLEASE TAKE NOTICE that the Intermediate Court of Appeals has entered the following Judgment on Appeal:

> Pursuant to the Memorandum Opinion of the Intermediate Court of Appeals entered herein on December 31, 1985, and the Order Denying January 10, 1986 Motion for Reconsideration entered herein on January 17, 1986, the Appeal is dismissed for lack of appellate jurisdiction. This Judgment shall be effective as of January 17, 1986.
>
> DATED: Honolulu, Hawaii; July 8, 1986.
>
> BY THE COURT:
>
> /s/ Darrell M. Phillips
> Of Clerk

The form of the foregoing notice is approved and IT IS ORDERED that the same issue forthwith.

DATED: Honolulu, Hawaii; July 8, 1986.

/s/ James S. Burns
Chief Judge

NO OBJECTION:

/s/ Gary Victor Dubin
Attorney for Plaintiffs

/s/ Cathy A. Lee
Attorney for Defendants
Willis Sinsabaugh and Waterfront
Properties, Inc.

/s/ Cheryl Nakamura
Attorney for Intervenor-Defendant
The Fidelity Standard Life Insurance
Company

4112s

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within document was duly served by hand delivery on the following persons at their respective addresses shown below.

GARY VICTOR DUBIN, ESQ.
345 Queen Street, Suite 800
Honolulu, Hawaii 96813
Attorney for Plaintiff-Appellants

CATHY A. LEE
Suite 2500
Grosvenor Center, Mauka Tower
737 Bishop Street
Honolulu, Hawaii 96813
Attorneys for Defendant-Appellees
Willis Sinsabaugh and
Waterfront Properties, Inc.

DATED: Honolulu, Hawaii; July 7, 1986.

/s/ Lorrin B. Hirano

4112s